



MICHAEL D. SCOTT
EXECUTIVE DIRECTOR
E-MAIL: MSCOTT@NCCMP.ORG

November 22, 2019

The Honorable Preston Rutledge
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Rule regarding Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA and Request for Information
RIN 1210-AB90

Filed via Federal Rulemaking Portal: <http://www.regulations.gov>

Dear Assistant Secretary Rutledge:

The National Coordinating Committee for Multiemployer Plans (“NCCMP”) appreciates the opportunity to submit these comments in response to the Department of Labor’s (“DOL”) Proposed Rule regarding Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA (“Proposed Rule”) and Request for Information (“Information Request”), published in the Federal Register on October 23, 2019 (84 FR 56894). We appreciate and support the DOL’s continued effort, through the Employee Benefits Security Administration, to modernize ERISA’s electronic delivery standard and the request for information, data, and ideas on additional measures the DOL could take in the future to improve the effectiveness of ERISA disclosures.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the job-creating employers of America and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP’s purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America’s working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code (“IRC”) Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. Those segments include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel,

and trucking industries. Multiemployer plans are jointly trusteeed by employer and employee trustees.

SUMMARY OF COMMENTS

The NCCMP is generally supportive of the “notice and access” framework and the “opt-out” feature described in the Proposed Rule as it can provide, among other things, a significant administrative cost-saving measure to some pension plans. We have a number of suggestions for changes to the rule that would make the rule more useful for multiemployer plans and accommodate the structure of such plans:

- The current safe harbor with the focus on employees who are “wired at work” has not been a practical option for multiemployer plans.
- Flexibility is needed to use different forms of notifications of electronic availability for different participant populations, including paper notification.
- The new safe harbor should allow for alternative methods of electronic delivery in addition to through a website.
- The provisions regarding severance from employment should be modified to reflect multiemployer plan structure.
- New electronic delivery options should be extended to welfare plans. Application of the provisions in the proposed rule to welfare plan documents that are within DOL jurisdiction, such as the SPD, should be included in the final rule and should not be held for future rulemaking.
- Finally, we are concerned that the Proposed Rule and the Information Request do not provide a sufficient time period that allows for a more meaningful review and response from interested parties. Therefore, we urge the DOL to extend the comment period in light of the breadth of questions asked and information requested.

BACKGROUND ON MULTIEMPLOYER PLANS

Multiemployer plans are a product of the collective bargaining process, where at least one labor organization and two or more employers provide health, pension and a variety of other employee benefits through negotiated contributions to trust funds that are required by law to be maintained for the “sole and exclusive benefit” of plan participants. Multiemployer plans are jointly trusteeed by both labor and management trustees and are subject to applicable provisions of the Taft-Hartley Act, ERISA, and the IRC.

The structure of multiemployer pension and welfare plans is different from that of a single employer plan, and this structure places some limits on the ability of a plan’s trustees to communicate with the participants and beneficiaries of the plan. Single employer plans typically provide benefits to workers at a single workplace, or within a single communications structure.

For example, each employee may have a corporate email address and access to corporate workstations.

In the multiemployer plan context, however, employees often work for a variety of employers who contribute to a pension or a welfare plan based on the terms of a collective bargaining agreement. These workers may be in the construction, entertainment, or transportation industry, or other industries where they are required to perform tasks at a variety of worksites for multiple employers. In addition, plans often provide benefits to retired workers who would not have access to an employment-based email or workstation.

Multiemployer plans use many techniques to communicate with plan participants and beneficiaries. These include traditional mailings, enrollment materials, postcards, and meetings. Multiemployer plans are often self-administered, with an active Fund Office that is centrally located and easily accessible to plan participants. Unlike corporate record-keepers or insurers, the multiemployer plan Fund Office provides face-to-face contact between participants and plan administrators, which creates a strong relationship between them. Because participants often do not have a corporate email or workstation, the multiemployer plan Fund Office will hold informational meetings about plan changes or enrollment information.

Plans also attempt to provide information electronically, through websites and mobile applications. However, there are limitations on how to reach participants electronically because the corporate email/worksite connection does not generally exist.

Finally, most multiemployer plans tend to be stable over time, providing benefits on a long-term basis, as opposed to a single employer plan. Consequently, the relationship between the plan participant and the Fund Office tends to be strong and of long duration, allowing for creativity and flexibility when drafting electronic disclosure rules that apply to these plans.

DETAILED COMMENTS

1. The Current Safe Harbor Has Not Been A Practical Approach for Multiemployer Plans; An Alternative Opt-Out Approach Would Better Serve as an Administrative Cost-Saving Measure

Pension plans are subject to many disclosure requirements that include documents, such as summary plan descriptions (SPDs), which can be lengthy. Electronic disclosure of such documents, for plans electing that approach, may provide a cost-saving measure in terms of the production costs involved, including printing, staff time in the preparing disclosures for mailing, and postage costs. The Proposed Rule's broadening of the availability of electronic disclosure of such documents can have a positive impact on administrative costs.

In order to be effective, electronic disclosure rules need to be clear, easily administered, and consistent between different required disclosure obligations. Although the current DOL Safe

Harbor¹ has been effective in providing an electronic disclosure option for plan communications when offered to individuals who have access to electronic workstations at a worksite these rules have not provided a good alternative for multiemployer plans because participants work for multiple employers. Some plans have attempted to obtain participant “opt-ins” to electronic disclosure, seeking to follow the Safe Harbor and obtain authorization to transmit documents electronically consistent with the current rules. The opt-in process is cumbersome and takes a significant amount of resources to accomplish. A simpler, still optional process that does not require an affirmative opt-in, would be welcome.

2. Flexibility Is Needed to use Different Forms of Notifications of Electronic Availability for Different Participant Populations

Electronic communication has become a normalized means of reaching many individuals. However, as multiemployer pension plans have technologically diverse participant populations, the Proposed Rule should build in flexibility for plans to design their electronic communications outreach in consideration of those characteristics. For example, participants may have general access to the internet but may lack an electronic address. As such, in addition to the opt-out feature and the notice and access framework, plans that maintain websites should be able to send a paper notice, rather than using an electronic address, to inform participants, or sub-sets of participants, that information and disclosures are available on the plan’s website and that paper copies may be requested. Periodic paper notices reminding participants of the availability of such documents, as well as publication of this reminder in newsletters and other regular forms of outreach, would provide suitable safeguards for all participants in ensuring access to documents in their chosen manner.

3. The New Safe Harbor Should Allow for Alternative Methods of Electronic Delivery In Addition to Through a Website

The Proposed Rule requires a plan administrator to make the required document accessible online and then furnish a Notice of Internet Availability (NOIA) for these disclosures. We are concerned that the proposal, as written, could increase costs for some plans without websites as it would require them to establish and maintain a website for participant communications in order to use the safe harbor. We suggest that attaching a copy of a plan document, such as an SPD, to an email should be an alternative for those plan sponsors that do not maintain a benefits website dedicated to plan communications.

Single employer plans are likely to have access to a corporate internet as a matter of course – likely protected in a secure manner. However, multiemployer plans have not necessarily needed to provide information via an internet website. They also do not necessarily have access to a ready, secure website that can immediately be used for disclosure purposes. Rather than requiring a

¹ See 29 CFR 2520.104b-1(c).

website, the rule should be flexible to allow electronic transmission of the document via a secure file transfer, without requiring that a website be created.

4. The Provisions Regarding Severance From Employment Should be Modified to Reflect Multiemployer Plan Structure

The DOL solicits comments on whether the special rule for severance from employment in paragraph 29 CFR 2520.104b–31(h) accommodates routine practices of multiemployer pension plans. Specifically, paragraph (h) would provide that at the time a covered individual who is an employee severs from employment with the employer, the administrator must take measures reasonably calculated to ensure the continued accuracy of the electronic address described in paragraph (b) of this section or to obtain a new electronic address that enables receipt of covered documents following the individual’s severance from employment.

The administrator of a multiemployer plan would not typically have knowledge that a covered individual’s employment from a contributing employer has ended. The Fund Office may learn of termination afterward, when contributions on behalf of that individual are no longer received from that contributing employer. However, the individual could continue to be covered under the plan because of contributions from other contributing employers. We suggest that this rule be modified for multiemployer plans.

5. The Proposed Rule Should be Expanded to Include Welfare Plan Documents That are Within DOL Jurisdiction, Such as SPDs

The DOL states that it is reserving rules concerning electronic disclosure for welfare plans because of different concerns for those plans and because of tri-agency jurisdiction over many disclosure requirements, such as those in HIPAA and the Affordable Care Act. However, we suggest that there is no reason to carve welfare plans out of rulemaking on ERISA-governed disclosure requirements, such as SPDs, which do not involve tri-agency issues.

It is not uncommon for multiemployer plans to use the same administrator or Fund Office to administer eligibility for both pension and welfare benefits. While the plan documents, trustees, and SPDs are separate, plan participants come in to the same office to learn about plan benefits and ask questions. Having a uniform electronic disclosure rule for SPDs would be helpful so that plan administrators are not required to maintain two separate disclosure policies for different types of SPDs.

We support further extension of the opt-out approach in the Proposed Rule to additional health and welfare plan documents in future rule-making that involve tri-agency issues.

6. Extended Time Is Needed to Respond Fully

As a final comment, the Proposed Rule provided a 30-day window to comment on numerous and important questions posed by the DOL. The ability of stakeholders to provide feedback on the Proposed Rule and Information Request is vital to its successful and informed implementation, as well as to ensure that participants are not harmed or disadvantaged by enhanced use of electronic communication. In order to provide more thorough and meaningful analysis, we urge the DOL to extend that time period so that we, and other interested parties, can further develop additional suggested measures the DOL could take to improve the effectiveness of electronic communications and, more broadly, ERISA's disclosure requirements.

CONCLUSION

We appreciate the DOL's efforts to expand the use of electronic communications in meeting the disclosure requirements under ERISA. We believe, however, that the Proposed Rule and Information Request can be improved as mentioned above, including extending the comment period so that interested parties may have more time to provide more detailed responses.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "m d scott", is centered on a light gray rectangular background.

Michael D. Scott
Executive Director