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Could ERISA Rules Align with Notice & Access?

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It has been frustrating for companies who want to benefit from the substantial cost-savings provided by the SEC notice and access rules to discover that they must also comply with the Department of Labor (DOL) ERISA rules regarding electronic communications to employees, if for example the employee shareholders hold company stock through a 401(k) plan that is registered on a Form S-8. As a practical matter, using notice and access for employee benefit plan participants has proved prohibitively difficult. The ERISA rules permit electronic delivery of documents only to participants who have the ability to access them at their regular place of work, and who have access to the company's electronic information system as an integral part of their duties. Even for those participants, administrators must try to ensure actual receipt of the documents and provide notice about the documents' significance. For participants who do not meet this test (e.g., former employees and current employees who do not work at computers) an affirmative consent, with specific content requirements, is required.

The DOL recently published a request for information (RIF) soliciting "views, suggestions and comments" from interested parties on the use of electronic media by employee benefit plans to furnish information to participants. The rules have not been updated since 2002, a lifetime ago in terms of technological changes. The deadline is June 6th. This may be an opportunity to alert the DOL of the important need to finally align the ERISA rules with notice and access. One suggestion might be to permit plans to send plan participants and beneficiaries a paper notice/election stating that, unless a participant affirmatively elects otherwise, electronic access will be the default mode of access for certain items (such as proxy statements and cards). For other items, such as plan benefit statements, the notice could provide that the default will be a paper mailing, unless a participant affirmatively elects electronic access in lieu of paper. This notice/election could also be provided to new participants when they join a plan.

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