

Supreme Court's Sulyma Decision Creates Proof of Actual Knowledge Issue for Plan Fiduciaries

Working Together

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By Sharon Freilich



Since its adoption the Employee Retirement Income Securities Act of 1974, as amended (“ERISA”), has required employee benefit plan sponsors to make disclosures regarding plan terms and plan expenses. The most well-known of these disclosure is the Summary Plan Description. The number of disclosures that plan sponsors are required to provide has increased over time. As a consequence, since 1997 the U.S. Department of Labor (the “DOL”) has had a safe harbor that permits the electronic distribution of the required disclosures. A new safe harbor focusing on accessing disclosures on an internet website became

available in July 2020, when the DOL’s Final Regulation issued on May 27, 2020 became effective.

The disclosures are important not only for informing participants about their benefits. Disclosures may also form the basis for determining when the ERISA statute of limitations for bringing breach of fiduciary claims starts to run. Under ERISA a claim for breach of fiduciary duty must be brought no later than the earlier of: (i) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation; or (ii) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation. The current question for plan sponsors is how to handle disclosures to participants in light of the U.S. Supreme Court’s recent decision regarding what “actual knowledge” means.

In February 2020 the U.S. Supreme Court issued its opinion in Intel Corporation Investment Policy Committee et al v. Sulyma, 589 U.S. _____ (2020), 140 S. Ct. 768, 206 L.Ed.2d 103 (2020,) finding that when ERISA declares that “actual knowledge” is required to trigger the 3 year statute of limitations for fiduciary breach actions, ERISA is to be taken literally. For a participant to have actual knowledge, her knowledge must be more than “potential, possible, virtual, conceivable, theoretical, hypothetical or nominal.” 140 S.Ct. at 777. Simply providing ERISA-required disclosures in a Summary Plan Description or other required disclosure under Title I of ERISA is not enough to prove that the participant actually read and understood the disclosures being made.

pullcom.com  @pullmancomley

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In the preamble to the Final Regulation concerning the new electronic disclosure safe harbor, the DOL cites Sulyma and notes that the regulation does not address issues such as whether a covered individual read, understood, or had actual knowledge of the contents of the covered documents accessed. It is beyond argument that it is in a participant's best interest to read and understand disclosures made regarding plan terms and investment alternatives. Accordingly, it would be prudent for plan fiduciaries to create a mechanism that strongly encourages plan participants to actually read disclosures and ask questions if they do not understand the disclosures. The fact that these mechanisms may also be used to prove actual knowledge, thus triggering the running of the statute of limitations, is an additional incentive for putting such mechanisms in place.

Sulyma suggests several ways to prove "actual knowledge." "Evidence of disclosure would no doubt be relevant, as would be electronic records showing that the [participant] viewed the relevant document[s] and evidence suggesting that the [participant] took action in response to the information contained in them." 140 S.Ct. at 779. Sulyma also notes that fiduciaries can contend that evidence of "willful blindness" supports a finding of "actual knowledge." The doctrine of willful blindness has been used by prosecutors in criminal actions. The Supreme Court extended the application of the doctrine to civil cases for patent infringement in *Global-Tech Appliances, Inc. v. SEB S. A.*, 563 US 754 (2011). In *Global-Tech* the Court noted that the federal appellate courts do not have a uniform standard for proving willful blindness, but the standards have the following common requirements: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." 563 US at 769. Accordingly, the mechanisms adopted by plan fiduciaries to strongly encourage plan participants to read disclosures and ask questions if they do not understand the disclosures should be geared to establishing, where a participant denies reading the disclosure, that there is a high probability that the participant believed that plan disclosure documents contained specific information and then took deliberate actions to avoid accessing that information.

Below is a chart setting out the basic requirements of the safe harbor that has been in place since 2002, as modified by the Final Regulation, and the new safe harbor for providing retirement plan disclosures electronically. Both safe harbors provide for notices to participants (active and terminated entitled to benefits under the plan), retirees in pay status, beneficiaries and alternate payees ("Covered Individuals"). The updated 2002 safe harbor does not require affirmative initial notices to active employees who have effective access to electronic documents at work (often referred to as "Wired at Work" individuals), but in light of Sulyma plan sponsors may want to provide an initial notice to such individuals (see Chart below regarding initial notice requirements). Each notice requirement creates an opportunity for recipients to affirmatively acknowledge their receipt of the notice, comprehension of the notice, and their affirmative duty to review the disclosure referenced in the notice. When accessing an electronic disclosure, mechanisms can be added requiring the Covered Individual to specifically acknowledge review of the disclosure and comprehension of the information conveyed in the disclosure. Plan sponsors should confer with service providers and plan

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counsel about ways to adapt their disclosure procedures to address the Sulyma decision. **Safe Harbor Requirement** > 2002 Safe Harbor as modified in 2020 for Retirement and Welfare Benefit Plans > 2020 Alternate Safe Harbor for Retirement Plans Only **Covered Documents** > Documents that must be furnished to participants and beneficiaries under Title I of ERISA, except for documents that are furnished only upon request > Same but only applies to Retirement Plans **Covered Individuals** > Wired At Work Individuals > Individuals who do not satisfy Wired At Work Definition > Affirmative Consent not required for Wired at Work Individuals > Wired At Work Individual > Individuals who do not satisfy the Wired at Work Definition **Wired at Work Individual** > Participants who have effective access to electronic documents at any location where reasonably expected to perform their duties; and > Who have access to employer's or plan sponsor's electronic information as an integral part of their duties > Participants who have an electronic address assigned by the employer for employment related purposes that include, but are not limited to, the delivery of covered documents **Individuals who are Not Wired at Work** > A participant, beneficiary or other individual entitled to covered documents who has provided Affirmative Consent to receiving such documents. > A participant, beneficiary or other individual entitled to covered documents provided the employer, plan sponsor or administrator has an electronic address such as an email address or smartphone number (or other internet-connected mobile computing device) at which the individual may receive a notice **Required Notice to Non-Wired at Work Participant before obtaining Affirmative Consent** > Can be provided in electronic or paper form with a clear and conspicuous statement covering the following:

- > The types of documents to which consent would apply
- > Notice that consent may be withdrawn at any time
- > Procedures for withdrawing consent and updating the individual's email address
- > Right to request and obtain a paper version of an electronically furnished document, free of charge
- > Any hardware or software requirements for accessing and retaining documents > Not Applicable but see Initial Notification of Default Electronic Delivery and Right to Opt Out. **Affirmative Consent of Covered Individuals who are not Wired At Work** > Must affirmatively consent to receive documents electronically > Covered individual must provide email address (mobile devices not included) > Cover individual's consent must be in manner that reasonably demonstrates individual ability to access electronic documents > Not Applicable but see Initial Notification of default electronic delivery and right to opt out. **Required Notice After Obtaining Affirmative Consent** > **Only required if any hardware or software requirements for accessing documents change that create a material risk that the individual will be unable to access or retain electronic documents** > Notice must contain:
- > Revised hardware and/or software requirements to access electronic documents
- > Right to withdraw consent to receipt of electronic documents without charge
- > Provide the pre-Consent Notice and give individual's ability to consent again to electronic delivery of documents > Not Applicable—but regulations establishes standards for internet website and requirements

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for handling "internet access glitches" **Initial Notification of default electronic delivery and right to opt out.** > Not Applicable > Must be provided *on paper*

- > List all documents to be provided electronically to the electronic address
- > List electronic address that will be used to send documents to the Individual
- > Include any special instructions regarding accessing documents
- > Cautionary statement re length of time a document will be available
- > Statement of right to request and receive a paper version of the covered document free of charge on how to exercise this right;
- > Statement of right to opt out of electronic delivery and receive only paper versions of covered documents and an explanation of how to exercise this right.

> Must be provided before reliance on alternate safe harbor. **Notice of Internet Availability** > Not Applicable > Must be provided to each Covered Individual for each Covered Document

- > The regulation provides guidance for instances when more than one covered document may be included in the Notice of Internet Availability. **Content of Notice Of Internet Availability** > Not Applicable > A prominent statement that reads: "Disclosures About Your Retirement Plan."
- > A statement that reads: "Important information about your retirement plan is not available. Please review this information."
- > Identity of Covered Document and brief description if Name of document would not reasonable convey the nature of the document.
- > Internet website or hyperlink either to the Covered Document or login page that leads to a prominent link to covered document.
- > Statement re right to request and obtain a paper version, free of charge
- > Cautionary Statement that covered Document not required to be available for more than one year, or if later, after it is superseded by a subsequent version.
- > Telephone number to contact designated representative of Plan.
- > May include a statement inviting or requiring response to the Notice of Internet **Special Rule for Severance from Employment** > Not Required but useful practice > Applies to Wired at Work Individuals
- > Administrator must take measures reasonably calculated to ensure continued accuracy and availability of such electronic address or obtain new electronic address that enables receipt of covered documents after severance from employment.

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