Missing (But Not Forgotten?)

"Best practices" for locating missing participants.

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KEY POINTS

- The Department of Labor ("DOL") issued three pieces of guidance that help illuminate its view of best practices in locating missing and unresponsive participants.
- The guidance follows concerns about the DOL's aggressive enforcement posture despite the lack of published fiduciary guidelines.
- The guidance falls short of providing clear guardrails for plan fiduciaries and specific standards for DOL investigators.

On January 12, 2021, the U.S. Department of Labor ("DOL") issued three pieces of guidance intended to help plan fiduciaries meet their obligations under the Employee Retirement Income Security Act of 1974 (ERISA) to locate missing or nonresponsive participants.

The guidance was issued following concerns expressed by plan fiduciaries and service providers regarding the DOL's aggressive enforcement posture (despite the lack of published fiduciary guidelines). This paper provides details about the new guidance and the context within which it was issued.

Background

Missing participants in ongoing ERISA-governed plans have long presented fiduciary challenges for plan sponsors of defined contribution plans. Except for guidance applicable to terminated plans, the DOL has previously offered no guardrails to help plan fiduciaries understand their obligations with respect to those who do not claim their retirement benefits or cash retirement account distribution checks.

Plan sponsors have taken a variety of approaches in the absence of specific fiduciary guidelines. Some forfeit missing participants' account balances (which is authorized in Treasury regulations) to a plan-level forfeiture account and then reinstate those balances in the event participants later resurface and request their retirement benefits. More commonly, plan sponsors leave balances for missing participants invested in their retirement accounts. Recent DOL enforcement initiatives have been aggressive and have heightened the risk of these traditional approaches.

Through DOL enforcement actions, investigators have asserted fiduciary responsibilities that have never been articulated in published guidance, including:

- Plan administrators must undertake search efforts regardless of cost relative to participant balances;
- Plan administrators must repeat searches each year even when no addresses have been located in prior searches (or must switch search methodologies each year); and

- Plan administrators must take steps, without any regard to employee privacy concerns, to obtain contact information from current employees who might have worked with missing participants.

Some investigators have even gone so far as to question whether forfeiting missing participants' account balances (in accordance with plan language and consistent with Treasury regulations) constitutes a prohibited transaction.

Best Practices for Pension Plans

In its new guidance, which applies equally to both defined contribution and defined benefit plans, the DOL provides examples of best practices for locating missing participants.

The DOL acknowledges that not every best practice may be appropriate for every plan, and that plan fiduciaries should consider what can be done in a cost effective manner (i.e., it would be appropriate to consider the size of the participant's account balance in proportion to the cost of search efforts). The DOL notes that the specific search steps taken will depend on facts and circumstances particular to the plan and its participants—making it clear that the DOL's best practices do not constitute a safe harbor or bright line regarding fiduciary responsibility.

Identifying Red Flags

The DOL first identifies certain "red flags" that would indicate to a plan sponsor that there is a problem with missing or unresponsive participants, which include:

- More than a small number of missing or unresponsive participants.
- More than a small number of terminated and vested participants reaching normal retirement age and not receiving benefits.
- Missing, inaccurate, or incomplete contact information, census data, or both.
- Absence of sound policies and procedures for handling returned mail and/or stale dated checks.

The DOL then provides examples of best practices, based on its experiences in working with plans, which are organized into four categories outlined as follows.

Maintaining accurate census information

- Contact participants and beneficiaries periodically to confirm or update their contact information. "Relevant contact information could include home and business addresses, telephone numbers (including cell phone numbers), social media contact information, and next of kin/emergency contact information."
- Request regular updates to contact information for beneficiaries.
- Include requests for contact information changes in plan communications.
- Flag undeliverable mail (including email) and uncashed checks for follow-up.
- Provide online platform (e.g., website) for participants to update contact information (for themselves and their spouses/beneficiaries).
- Provide prompts upon login to online platforms to confirm contact information.
- Audit census information regularly (and correct any errors).
- When changing recordkeepers or in the case of a merger or acquisition: Transfer the appropriate plan information (including contact information) and relevant employment records ("e.g. next of kin information and emergency contacts").

Implementing effective communication strategies

- Use plain language and offer non-English language assistance as appropriate.
- State upfront and prominently the purpose of the communication.
- Encourage contact through websites and toll-free numbers.
- Build steps into employee onboarding and participant enrollment processes (and exit process for terminating/retiring employees) to confirm or update contact information. Also, advise regarding the importance of such information.
- Communicate regarding the option of consolidating accounts within the plan (i.e., from prior employer plans or rollover IRAs).
- In cases where a participant terminated before the plan or sponsor name changed: Mark correspondence clearly with the original plan or sponsor name and indicate its relevance (i.e., retirement benefits).

Conducting missing participant searches

Conduct regular searches using some or all of the following methods:

- Check related plan (e.g., records maintained by another of the employer's plans, such as a group health plan) and employer records (e.g., payroll records) for participant, beneficiary, and next of kin/emergency contact information. If there are privacy concerns, ask that the related plan or employer forward a communication to the individual.
- Check with designated plan beneficiaries and the employer's records for emergency contacts. If there are privacy concerns, ask the beneficiary or emergency contact to forward a communication to the individual.

- Use free online search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries, and social media to locate individuals.
- Use a commercial locator service, a credit-reporting agency, or a proprietary internet search tool to locate individuals.
- Use USPS certified mail, or private delivery service with similar tracking features if less expensive, to the last known mailing address.
- Attempt to contact through other available means (e.g., email addresses, telephone and text numbers, and social media).
- If participants continue to be nonresponsive: Conduct death searches (e.g., Social Security Death Index); redirect communications to beneficiaries (as necessary).
- Reach out to colleagues of missing participants (e.g., by contacting employees who worked in the same office) or publish a list of "missing" participants (i.e., on the company's intranet, in an email to employees, or in communications with other retirees). For union employees, reach out to local union offices and through union member communications.
- Register missing participants on pension registries with privacy and cyber security protections (e.g., National Registry of Unclaimed Retirement Benefits), and publicize the registry (e.g., through emails, newsletters, and other communications to employees, union members, and retirees).

Documenting procedures and actions

- Have written policies and procedures for clarity and consistency.
- Document key decisions and the actions taken towards implementation.
- Ensure the recordkeeper is performing agreed upon services, and work with the recordkeeper to identify and correct shortcomings in the plan's current practices (e.g., establish procedures for obtaining relevant information held by the employer).

Compliance Assistance Release: Covering Audits of Defined Benefit Plans

The Compliance Assistance Bulletin 2021-01 ("Bulletin") constitutes the DOL's second piece of guidance relating to missing participants. It is designed to ensure consistent investigation processes across regional offices of the DOL's Employee Benefits Security Administration when it conducts audits of defined benefit plans (as part of its Terminated Vested Participants Project).

The Bulletin describes:

- Information that investigators would ask for (i.e., plan documents, census records, actuarial reports, procedures and practices for communicating with participants, and procedures and practices for locating missing participants);
- "Red flags" and administrative errors that would be indicative of problems; and
- The process for closing out investigations.

The procedures and practices the DOL looks for, as well as the red flags and errors, are consistent with the "best practices" guidance (described earlier in this paper) that was released together with the Bulletin.

Field Assistance Bulletin: Facilitating Transfers of Benefits to PBGC

The DOL's third piece of guidance, Field Assistance Bulletin 2021-01 ("FAB"), announces a temporary non-enforcement policy relating to the use of the Pension Benefit Guaranty Corporation's (PBGC) expanded Missing Participants Program by terminating defined contribution plans. The policy applies to fiduciaries of terminating defined contribution plans and qualified termination administrators (QTA) of abandoned plans.

DOL regulations provide a fiduciary safe harbor when making distributions from terminated or abandoned plans. The safe harbor generally requires the rollover to an IRA of distributions to unresponsive or missing participants.

Following issuance of the DOL's safe harbor, the PBGC in 2017 issued regulations implementing a directive from the Pension Protection Act of 2006 to establish a program for missing participants in defined contribution plans. The PBGC program includes the following features:

- Allows for the transfer of benefits of any size;
- Conducts periodic active searches for missing participants;
- Does not charge ongoing maintenance fees or distribution charges;
- Provides for asset grow with interest; and
- Makes available lifetime income options for balance transfers over $5,000.

Under the DOL's temporary non-enforcement policy, it will not pursue violations under ERISA section 404(a) against responsible plan fiduciaries of terminated plans or QTAs of abandoned plans when transferring assets to the PBGC and participating in its missing participant program if the plan fiduciary or QTA complies with the guidance in the FAB and "has acted in accordance with a good faith, reasonable interpretation of section 404 of ERISA with respect to matters not specifically addressed in [the FAB]."

The conditions include compliance with the DOL safe harbor applicable to transfer of assets to an IRA (except that the required participant notice must be modified to reflect the transfer to the PBGC), requirements applicable to the payment of PBGC fees from transferred accounts, and requirements applicable to accounts associated with uncashed checks.

Final Thoughts on the Guidance

The DOL guidance falls short of providing clear guardrails for plan fiduciaries and specific standards for DOL investigators. It provides a menu of different approaches that can be used, and notes that not all approaches are necessary, but provides no standards by which a fiduciary or an investigator might judge which of the diverse standards are appropriate in any specific circumstance other than to say that plan fiduciaries should consider what can be done in a cost effective manner. DOL indicates that the specific search steps taken will depend on facts and circumstances particular to the plan and its participants.

While some of the best practices suggested by the DOL are well accepted and practical, a number of approaches raise privacy concerns or would be difficult to satisfy. For example, the guidance does not distinguish between small employers with deep personal connections to their employees and multi-state (or multi-national) employers with far less personal knowledge of their employees. Also, the guidance does not recognize that service providers such as recordkeepers, who are outside of the employer-employee relationship and have only limited access to employee data, are relied upon by plan fiduciaries to help fulfill their responsibilities to locate missing participants.

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