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Are You Looking for Missing Participants?

By *Laura Guin*

The Department of Labor (DOL) continues to focus on missing participants in retirement plans. In recent years, the DOL, in conjunction with the Employee Benefits Security Administration (EBSA), has been auditing retirement plans and reinforcing the actions that plan sponsors must take to locate lost participants and pay the benefits due to them.

"There's really no more basic fiduciary duty than the duty to operate the plan for the purpose of paying benefits, so falling down here is a serious matter," explained Preston Rutledge, Assistant Secretary of Labor for EBSA, while speaking at a policy conference. "We can't just look the other way."[1]

While formal guidance is primarily directed at terminating plans, DOL auditors still expect sponsors of active, ongoing plans to be routinely searching for missing participants. Plan sponsors under DOL investigation have reported surprising positions taken by some DOL auditors[2], including:

- Failure to *find* a missing participant is a breach of fiduciary duty.
- A plan which forfeits funds back to the plan until a participant is found is engaging in a *prohibited transaction*.
- Sponsors must document their efforts to find missing participants and should try different search methods *every year*.

These Searches Make Sense

Aside from the DOL's focus, there are a number of practical reasons plan sponsors should address lost participant accounts:

- There are large amounts of money at issue. In fiscal 2018, the DOL reported recovering $807 million for terminated, vested participants in retirement plans.[1]
- Missing participants may prevent payment of required minimum distributions (RMDs), which may result in penalties to the employer and participant.
- Missing participants may prevent payment of death benefits. This is another important reason to maintain up-to-date beneficiary election data.
- Missing participants may prevent payment of annual cash-out distributions for balances under $5,000. When processed timely, these cash-outs help reduce the number of terminated accounts for which the employer is paying its recordkeeping service.
- Missing participants may delay plan terminations, requiring another year of audit and governmental filings.

Current Guidance

While the retirement industry awaits formal guidance addressing active plans, plan sponsors can refer to prior guidance issued for terminating plans. This guidance offers recommended steps to document attempts to locate missing participants.

The DOL released Field Assistance Bulletin (FAB) 2014-01 [3] listing the fiduciary duties related to missing participants in terminating 401(k) plans (and other defined contribution plans). It requires plan fiduciaries to take *all* of the following steps to search for missing participants:

1. Send a notice by certified mail.
2. Check related plan and employer records.
3. Contact the participant's named beneficiary.
4. Use free internet search tools (such as search engines, public record databases, obituaries, and social media).
5. If the fiduciary does not find the missing participant during the required steps above, the fiduciary must *consider* additional search methods that may involve fees (such as, fee-based Internet search services, commercial locator services, or credit reporting agencies). Sponsors may take into account the size of the account balance, and may charge associated fees against the account.

Since 2014, other agencies have released similar guidance. The IRS issued a Memorandum in 2017[4] for when its Employee Plans (EP) examiners should *not* enforce penalties for missed RMD payments. This memo required the plan to take virtually the same search steps before concluding it would not or could not pay an RMD.

Similarly, when the Pension Benefit Guarantee Corporation (PBGC) expanded its Missing Participants Program[5] to terminating 401(k) plans in 2018, it pointed to the guidance under FAB 2014-01 for its requirement to conduct a "diligent search" before reporting or transferring missing participant accounts to the PBGC.

Handling Small Balances

Many sponsors have adopted distribution provisions to promptly pay out terminated employees with small balances, which can help prevent participants from losing track of their accounts in the first place. The IRS requires balances between $1,000 and $5,000, which are distributed without the participant's' consent, to be rolled into a default IRA.[6] Therefore, most 401(k) plans will only force-pay balances under $1,000 as true cash-out distributions. Even when these cash-outs are paid annually, some of the smallest checks may go uncashed, and end up on the list of "missing participants" to be dealt with another way.

Retirement Clearinghouse, LLC (RCH) recently received approval from the DOL[7] for its Auto-Portability Program, which may help connect participants with their old accounts. This service identifies when an individual with a default IRA has opened a new plan account with a new employer. If the participant does not respond to two letters of notification, RCH then automatically transfers the default IRA into the new plan account. This way, the account follows the participant – even when they take no action. The DOL has given RCH a prohibited transaction exemption (for five years) on fees collected for facilitating rollovers of small balances.

Best Practices

It's important to be diligent in monitoring the plan for uncashed checks or nonresponsive participants. The DOL has made it clear that this is a fiduciary duty of the plan sponsor. Service providers often can help identify accounts that may need special attention, so sponsors should coordinate efforts to establish proper procedures and designate an individual or team to ensure necessary follow-up efforts are taken.

Consider the following questions. Do you:

- Have a formal procedure for identifying missing participants?
- Conduct a full plan review for missing participants at least annually? (Consider timing this review with another annual process, such as annual cash-out distributions.)

- Review uncashed check reports from the trustee? (These are typically made available on a monthly or quarterly basis.)
- Conduct address searches for returned checks?
- Document the steps that are taken annually to locate missing participants?

Questions? Contact the Findley consultant you normally work with, or contact Laura Guin, CPC at *615.665.5420* or *Laura.Guin@findley.com*

References

[1] ThinkAdvisor: *https://www.thinkadvisor.com/2019/02/26/missing-401k-participants-on-dols-radar-ebsa-chief/?slreturn=20200117125907*

[2] Pension & Investments: *https://www.pionline.com/article/20180305/PRINT/180309913/dol-demands-real-action-over-missing-participants*

[3] U.S. Department of Labor: *https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2014-01*

[4] BenefitsLink.com: *https://benefitslink.com/src/irs/tege-04-1017-0033.pdf*

IRM 4.71.1.4: *https://www.irs.gov/irm/part4/irm_04-071-001*

[5] PBGC: *https://www.pbgc.gov/prac/missing-participants-program*

[6] IRS: *https://www.irs.gov/retirement-plans/plan-participant-employee/401k-resource-guide-plan-participants-general-distribution-rules*

[7] Federal Register: *https://www.govinfo.gov/content/pkg/FR-2019-07-31/pdf/2019-16237.pdf*