DOL Issues Guidance on Missing Participants for Retirement Plans

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March 19, 2021

On January 12, 2021, the Department of Labor (DOL) issued long-awaited guidance for retirement plan fiduciaries that is relevant to any employer who sponsors a retirement plan that is subject to the fiduciary requirements of ERISA, including 401(k), 403(b), profit sharing, and defined benefit pension plans. Of particular import, the guidance addresses best practices for locating and distributing retirement plan benefits to missing or non-responsive participants. The DOL also includes other helpful guidance, as discussed in more detail below.

Best Practices for Locating Missing Participants

The DOL guidance includes examples of best practices employers and plans might implement for locating missing participants and beneficiaries. At the same time, the DOL points out the importance of the relevant facts and circumstances, including the size of a participant's accrued benefit or account balance and the costs of any search efforts needed.

According to the guidance, the following practices should be used to minimize and mitigate the problem of missing or non-responsive participants.

1*. Maintaining accurate census information for the plan's participant population by:*

- Contacting participants and beneficiaries on a periodic basis to confirm or update their contact information;
- Prompting participants and beneficiaries to confirm contact information upon login to online platforms; and
- Making missing participant searches part of the collection and transfer of records process during mergers, acquisitions, and divestitures.

2. ***Implementing effective communication strategies by:***

- Using plain language and offering non-English language assistance where appropriate;
- Stating upfront and prominently what the communication is about; and
- Clearly marking envelopes and correspondence with the original plan or sponsor name for participants who separated before any interim plan or sponsor name changes.

3. ***Searching for missing participants by:***

- Checking related plan and employer records for participant, beneficiary, and next of kin/emergency contact information;
- Using a commercial locator service, credit-reporting agency, or proprietary internet search tool; and
- Reaching out to colleagues of missing participants.

4. ***Documenting procedures and actions by:***

- Putting the plan's policies and procedures in writing to ensure they are clear and result in consistent practices;
- Documenting key decisions and steps taken to implement the policies; and
- Overseeing any third-party record keepers to ensure identification and correction of shortcomings in the plan's recordkeeping and communication practices.

Terminated Vested Participants Project Audits

The DOL guidance also includes a memorandum outlining investigative processes and case-closing practices for audits of defined benefit pension plans under the DOL's Terminated Vested Participants Project (TVPP). The TVPP focuses on plans that are likely to have issues related to keeping track of terminated vested participants (TVPs) and timely distribution of benefits. These include plans whose Form 5500s reflect a large number of retirees or TVPs who are entitled to future benefits, as well as plans whose sponsors face bankruptcy or are involved in mergers or acquisitions. Also included are plans whose participants have had to contact the DOL for help in confirming and claiming their benefits.

Absent especially substantial errors or widespread fiduciary breaches, individual plan fiduciaries generally will not be cited with specific ERISA violations identified in a TVPP audit. However, if participants incur excise taxes due to a fiduciary violation of ERISA, the fiduciary could be required to correct the breach by obtaining a waiver of such excise taxes from the Internal Revenue Service or reimbursing the participant for any such excise taxes and associated expenses.

Temporary Enforcement Policy for Terminating Defined Contribution Plans

When transferring the account balances of missing or non-responsive participants, fiduciaries of terminating defined contribution plans may use a special DOL safe harbor pursuant to which they would transfer unclaimed account balances to an IRA, bank account, or state unclaimed property fund and meet certain notice requirements. In its new guidance, the DOL has effectively added to the safe harbor the option of transferring account balances of missing or non-responsive participants to the PBGC. To be eligible for this new relief, the fiduciary must otherwise comply with the requirements of the safe harbor, including that it be acting in good faith and satisfy applicable notice requirements.

This temporary enforcement policy does not preclude the DOL from pursuing violations against fiduciaries for failing to diligently search for participants and beneficiaries before transferring their account balances to the PBGC or for failing to maintain plan and employer records. The temporary enforcement policy will remain in force until superseded by subsequent guidance.

If you have any questions about this guidance, would like assistance in implementing best practices for locating missing or non-responsive participants and beneficiaries, or need help in responding to a

TVPP audit, please contact a member of our Employee Benefits Group.