

DOL Releases Guidance on Retirement Plan Missing Participants

Background

In recent years, the Department of Labor (DOL), which oversees employer retirement plans, has increasingly focused on issues that arise from *missing or nonresponsive participants*. This includes, for example, former employees who fail to update their contact information, do not elect to timely commence receiving their plan benefits, or fail to cash their benefit checks.

Missing participant issues can arise in the context of both ongoing and terminating plans. These issues may range from one-off administrative headaches, to systemic plan administration issues to major plan termination compliance issues. According to DOL, plan sponsors must not passively sit back and wait for missing participants to one day appear and claim their benefits. Even in the context of an ongoing plan, plan sponsors have a fiduciary duty to actively identify and locate missing participants and ensure that participant communications concerning eligibility to receive benefits are properly distributed to, and understood by, plan participants. Some investment platforms and other third-party service providers can assist plan sponsors in dealing with missing participants.

Over the years, DOL has provided a patchwork of guidance concerning missing participants. For example, a DOL regulation generally allows a terminating defined contribution plan to transfer plan accounts of missing participants to a rollover IRA in the participant's name.

The following is a brief summary of recently-issued DOL releases dealing with these issues.

Red Flags and Best Practices

DOL has issued lists to help plan fiduciaries identify and deal with missing participant issues.

Red Flags Indicating Potential Missing Participant Problems

- More than a small number of missing or nonresponsive participants
- More than a small number of terminated vested participants have reached normal retirement age but have not started receiving their benefits

- Missing, inaccurate, or incomplete contact information or census data, or placeholder entries (e.g., birthdate is “1/1/1900”)
- Absence of sound policies and procedures for handling mail or email identified as undeliverable
- Absence of sound policies and procedures for handling uncashed checks

Best Practice: Maintaining Accurate Census Data

- Regularly contacting participants to confirm or update contact information
- Maintaining online systems that allow participants to update their own information
- Flagging undeliverable mail and email and uncashed checks for follow-up
- Requesting contact information updates upon log-in to accounts
- Regularly auditing census information and correcting errors

Best Practice: Implementing Effective Participant Communications

- Using plain language
- Clearly and prominently stating what the communication is about
- Encouraging contact through plan / plan sponsor websites and toll-free numbers
- Building steps into onboarding, enrollment, and exit processes to confirm or update contact information and plan data and to encourage participants to keep their plan data updated and current at all times

Best Practice: Improving Missing Participant Searches

- Checking plan and employer records for alternative contact information
- Checking with beneficiaries and employer emergency contacts for updated contact information

- Using free online search engines, social media and public records databases and commercial locator searches
- Using certified mail or private delivery services that provide tracking
- Attempting contact using email addresses, telephone and text numbers and social media

Best Practice: Documenting Administrative Procedures and Actions

- Creating written policies and procedures that are clear and consistently implemented and followed
- Documenting key decisions and steps and actions taken
- Monitoring any third-party recordkeepers and other service providers to ensure performance of agreed upon services and working to identify and correct any shortcomings in policies, practices or procedures

Terminated Vested Participants in Defined Benefit Pension Plans

DOL has an ongoing audit project that focuses on defined benefit plans that appear to have systemic issues related to keeping track of terminated vested participants and timely distributing benefits. For example, DOL points out that a plan's Form 5500 reporting a large number of terminated vested participants who are entitled to future benefits may be a red flag for a DOL audit.

DOL audits can be particularly time-consuming and expensive. Accordingly, serious attention should be given to missing participant issues to keep your plan off DOL's audit radar screen. For example, plan sponsors should pay particular attention to effectively communicating with terminated vested participants regarding their benefits and taking sufficient steps to identify and address missing participant situations.

According to DOL the following are insufficient practices which should be avoided:

- Continuing to deliver required plan communications to a known bad address without taking steps to verify the correct address
- Failing to use simple methods and resources like the US Post Office's Address

Correction Service and/or the National Change of Address (NCOA) database to find replacement addresses

- Failing to properly use the missing participant search and location services offered by the plan's record keeper or other service provider

Participation of Terminating Defined Contribution Plans in PBGC Missing Participants Program

As an alternative to rolling over missing participants' account balances to IRAs, there is a program for terminating defined contribution plans that allows transfer of account balances of missing participants to the Pension Benefit Guaranty Corporation (PBGC). A recent DOL policy cites the benefits of using the PBGC program and outlines procedural rules that apply. DOL cautions, however, that even if a plan sponsor uses the PBGC program, the sponsor still has a fiduciary duty to diligently search for participants prior to the transfer of missing participant account balances to PBGC and to maintain plan and employer records.

Please let us know if you need assistance in identifying, addressing and/or preventing missing participant issues for your retirement plan. You should feel free to contact Andrew Roth, Esq. at (914) 220-8033 or ARoth@dmlawyers.com.