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Episode 6: Recent DOL Missing Participant and IRS Missed RMD Enforcement Activities

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Audio Transcript:
David Rogers: Welcome to Winston's Benefit Blast Podcast. I'm David Rogers, a partner in the Employee Benefits and Executive Compensation group and I'm joined by Dave Diaz, the director of our Compliance Center and an attorney in our Washington, D.C. office. During this episode, we will be discussing what we at Winston are seeing in recent Department of Labor retirement plan audits.

David Rogers: So Dave, what can you tell us about recent DOL enforcement activities?

Dave Diaz: Actually the Internal Revenue Service (IRS), the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC) recently have all been paying close attention to how employers deal with missing participants, including increased scrutiny of timely payments to terminated invested participants with benefits between $1,000 and $5,000, terminated invested participants age 65, and required minimum distributions to participants at or near age 70-1/2.

Dave Diaz: The DOL, in particular, has undertaken numerous investigations on missing participants as part of its terminated vested participant project. This initiative has been ongoing since 2015 and unfortunately for employers, the DOL has been aggressively challenging the adequacy of employer efforts to locate and contact missing participants.

David Rogers: Well, we certainly have seen an increased audit activity by all three agencies that govern with respect to qualified retirement plans. But why do you believe there's been an increase in the DOL scrutiny?

Dave Diaz: So, there's two main reasons that I believe there's been increased scrutiny. First, the Trump Administration allocated $9.7 billion to the DOL in fiscal year 2018. This represents a $2.4 billion cut. But the Omnibus Funding Bill, passed last March of 2018, allocated the DOL about $12.2 billion. President Trump has since proposed a $1.1 billion cut to the DOL for fiscal year 2019. So you see, the DOL has stated publicly that it has a lack of resources for enforcement. So to the department, using investigations as an enforcement tool makes more economic sense than filing lawsuits against employers.

Dave Diaz: Second, President Trump signed an Executive Order that requires governmental agencies to revoke two regulations for every new rule they want the issue. So as a result, we have a lack of guidance from the DOL on exactly how employers should follow up on a variety of challenges including bad addresses, returned mail, and missing or unresponsive participants and beneficiaries.

David Rogers: Now, I know we've seen DOL audits with respect to all sorts of different industries, but do you think that the DOL is focusing most of their attention on large employers?

Dave Diaz: Actually, no. Plans of all sizes deal with missing participant issues. However, it's large employers that are especially likely to face these challenges because their plans tend to be larger and more complex. Some with more significant acquisition histories, including acquisitions where a plan has inherited incomplete records.

David Rogers: I've been told by two DOL agents that their focus on this is based largely from 5500s and those plans with large asset balances, so I'm not surprised by that observation. Can you briefly describe the DOL's investigation process?

Dave Diaz: Well, the DOL generally starts by sending the employer a letter informing them of their investigation and requesting certain plan documents and participant census data. The DOL will next begin its review of the plan documents and all the information they've collected. The purpose of their review is to determine whether the employer's process for identifying and locating missing participants is effective. Part of the DOL's verification process involves contacting, on their own, missing participants or a sample group of missing participants to determine if the employer's process is sufficient. During audits, the DOL is consistently finding that these procedures are insufficient, and assessing employers with a breach of fiduciary duty for their insufficient processes. This more aggressive position creates legal problems for employers, particularly when the DOL has not proposed any guidance on exactly how employers should satisfy their fiduciary duties under ERISA.

David Rogers: We've had several discussions with senior officials at the DOL in Washington regarding the lack of guidance and the inconsistent positions taken by auditors around the country. So we are hopeful that the agency will issue guidance soon so that there can be some level of consistency across the country, and that employers will have a better understanding of how to correct, at least from the DOL's perspective, the issue with respect to lost participants. Can you now expand a little bit on how the DOL is challenging employers specifically?

Dave Diaz: Well, we're aware of numerous employers that have received 10-day compliance letters from the DOL during missing participant audits, that threatened sanctions for alleged violations of ERISA. The compliance letter typically states that the DOL is holding the plan and its fiduciaries is in violation of ERISA and is not ruling out taking legal action so long as the violations remain uncorrected.

David Rogers: Can you describe a little bit more fully what an employer might expect from a 10-day compliance letter?

Dave Diaz: Sure. In general, a compliance letter outlines the alleged violations that the department has identified and the facts upon which its conclusions are based. It gives notice that correction of the alleged violation should be made. It provides warning of the consequences of inaction. It invites the plan fiduciaries to enter into a settlement agreement with the department to avoid a lawsuit, and it also requests that the plan fiduciaries respond within 10 days of receipt of the letter with a proposal that outlines the corrections of the violations.

David Rogers: All right, so now let's talk a little bit about what those alleged violations are in the 10-day compliance letter so that employers can have a sense of how they might try to preempt or proactively address what they might see from a DOL audit.

Dave Diaz: Sure. In addition to alleging breach of fiduciary duty claims, the DOL is also reviewing plan documents for plan language that either shifts the responsibility for keeping up to date contact and beneficiary information from plan fiduciaries to participants, and/or excuses the plan's fiduciaries from any obligation to search for missing participants. Any language like this is in violation of ERISA because in the DOL's view, plan fiduciaries have a duty to keep accurate and up to date contact information for participants and beneficiaries. This is also important. And if the plans have missing participants, those missing participants are also not receiving certain participant notices as required under ERISA, and failure to provide these notices is also a violation of ERISA.

Dave Diaz: We've also seen the DOL broaden its scope when auditing retirement plans to include detailed inquiries into plan administrative procedures for the payment of required minimum distributions. Since payment of required minimum distributions is a requirement for tax-qualified plans under the Internal Revenue Code, enforcement of these rules has not previously been considered under the purview of the DOL. Nonetheless, the department has been questioning on audit whether plans have complied with the payments of required minimum distributions for participants upon their attainment of age 70-1/2.

David Rogers: Yeah, I think we've also seen them expand audits. So first of all, an audit letter will probably cover the three open years with the DOL, but then they'll ask for an extension of time if that statute of limitations is going to run. But we've also seen them expand them to other qualified retirement plans maintained by the employer, to the extent they find that the procedures for the plan under audit are insufficient in their mind. So expansion of time as well as expansion of plans. We've seen a number of times. So what, not that we would recommend this, but what are the consequences should an employer choose not to take corrective, or enter into a settlement agreement with the DOL? What can they expect?

Dave Diaz: Well, the compliance letter will typically state that the DOL is holding the plant and its fiduciaries in violation of ERISA, and is not ruling out taking legal action so long as these violations remain uncorrected. To encourage employers to take corrective action based on a settlement agreement with the department, the DOL will offer to refrain from exercising its authority under ERISA to bring a lawsuit against the plan or any named fiduciaries with regard to these issues, and close its investigation without further legal action.

Dave Diaz: However, there's a special word of caution for plan fiduciaries. We are seeing audits where the DOL has alleged breach of fiduciary duty and named individual members of a plan committee. This is a major concern, as the vast majority of committee members likely have no idea of the significant liability they're exposed to in their duties regarding their company's retirement plan under ERISA. What we don't want to have is a committee members being found liable of fiduciary breach, which could result in personal liability and the possibility of never being able to serve in a fiduciary capacity again.

David Rogers: Yeah. So in this respect, one thing that employers should focus on is the ability to discuss with the DOL what their letter will look like, so that either individuals are not named in the letter or, if the DOL will take the position that taking corrective action will lead them to conclude that there hasn't been any breach of fiduciary duty. So it's important to talk with the DOL before they issue this final letter. What about additional monetary fines or penalties that the employer may face or the fiduciaries might face?

Dave Diaz: Sure. Separate from any legal action, ERISA also authorizes the Department of Labor to assess a civil penalty against a plan fiduciary who breaches a fiduciary duty. The department interprets this language authorizing this penalty to be a mandatory provision, giving it no discretion in the imposition of the penalty. And of course, the Department of Labor is treating existing missing participant investigations as requiring the imposition of a penalty. So here the DOL could seek to impose a penalty regardless of any settlement agreement that's reached.

David Rogers: Okay. So let's talk about best practices regarding missing participants that you would recommend to plan sponsors of defined contribution or defined benefit plans.

Dave Diaz: Well, we would recommend that employers at a minimum attempt to contact the participant, a missing participant, via certified mail, to the last known mailing address and any other contact information such as an email or telephone number. We also would recommend sending an inquiry to the participant's beneficiary, searching for alternative contact information in the plan records internally or through publicly available records, use a commercial locator service, a credit reporting agency or public record search engines, regularly update participant and beneficiary contact information, including reminders and participant communications to encourage participants to advise plan sponsors and record keepers of any changes.

Dave Diaz: We also would recommend plan sponsors establish a system for searches, document steps taken for locating missing participants and unresponsive participants, and finally put procedures in place for managing missing participants' accounts. Employers should also maintain a missing participant policy and ensure that that policy aligns with the practices of the plan's record keeper and third-party service providers. It's often the plan's record keeper that is charged with sending notices to participants. There should be a routine process in place for the record keeper to inform the employer of returned or undeliverable mail.

David Rogers: Thanks. All of those points are points that we have advised our clients, based upon our experience with DOL audits across the country. That really it's the process that they want documented and formalized in order for all deferred vested required minimum distribution participants who attain normal retirement age, and distributions of under a thousand or between 1,000 and 5,000 depending on how the plan is written. That process needs to be formalized and all employers should attempt to do this in connection with their outside counsel and record keeper in advance of any potential DOL audit. Dave, you have any final advice for employers?

Dave Diaz: Yes. We recommend that every plan sponsor look closely at its procedures for finding missing participants and distributing required minimum distributions. Plan administrators of both defined contribution and defined benefit pension plans should have frank discussions with their third-party administrators about their missing participant procedures, to ensure that they comply with the guidance issued by the DOL and the IRS, and should keep detailed audit trails of the efforts made on an annual basis.

David Rogers: Thanks a lot Dave, and thank you all for listening to another edition of our Benefits Blast Podcast. Stay tuned to future episodes for more insights on the latest legislative, regulatory, and practical developments concerning employee benefits and executive compensation programs. Also, please check out our Benefits Blast Blogs, located on winston.com, for updates on the latest legal developments in the employee benefits area. Thanks again.

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