

Missing Participants and Required Minimum Distributions: Increased Enforcement, Alleged ERISA Violations, and Limited Guidance Cause Headaches for Plan Fiduciaries

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The Internal Revenue Service (IRS), the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC) recently have been paying close attention to how employers deal with retirement plan participants who cannot be located, including increased scrutiny of timely payment of required minimum distributions (RMDs) for participants at or near age 70-1/2. Unfortunately for employers, the DOL in particular has been aggressively challenging the adequacy of employer efforts to locate and contact missing participants. Numerous plan sponsors have received letters from the DOL during missing participant audits that threaten sanctions against plan fiduciaries for alleged violations of ERISA, despite a lack of definitive guidance on exactly how employers should follow up on a variety of challenges, including bad addresses, returned mail, and missing or unresponsive participants and beneficiaries. At the same time, the DOL has recently broadened its scope when auditing retirement plans to include detailed inquiries into plan administrative procedures for payment of RMDs.

Since payment of RMDs is a requirement for tax-qualified plans under the Internal Revenue Code (the “Code”), enforcement of RMD rules has not previously been considered within the purview of the DOL. Nevertheless, the DOL has been questioning on audit whether plans have complied with payments of RMDs for participants upon their attainment of age 70-1/2 (or, if later, upon retirement for participants who are not 5% owners of the plan sponsor). Some DOL auditors are even requiring plan sponsors to follow procedures for handling RMDs that fall outside any previously published guidance from the IRS, DOL, or PBGC. However, after plan sponsors and industry groups expressed concern and confusion about the new DOL focus on RMDs and missing participants, the IRS and PBGC recently released guidance that provides some limited relief for plan sponsors, at least until further guidance is issued.

Winston Note: As workforces become more mobile and privacy concerns loom larger, employers and industry groups are urging the DOL, IRS, and PBGC to provide more guidance on how to address the growing and complex problem of missing participants. The state of the current guidance is described below.

Current DOL Guidance and National Enforcement Efforts

Currently, [DOL Field Assistance Bulletin \(FAB\) 2014-01](#) is the primary guidance from the DOL that specifically references procedures for dealing with missing participants. Issued in 2014, FAB 2014-01 details steps that the DOL

recommends plan sponsors take to find missing participants in terminating defined contribution plans. Unfortunately, FAB 2014-01 is limited to terminating defined contribution plans only, and does not extend to defined benefit plans or ongoing defined contribution plans. As a result, it is unclear whether the DOL expects plan administrators to follow the procedures laid out in FAB 2014-01 when dealing with missing participants in ongoing defined contribution and defined benefit plans. Nevertheless, plan fiduciaries should consider the procedures laid out in FAB 2014-01 when reviewing their practices for dealing with missing participants.

FAB 2014-01 indicates that plan administrators of terminating defined contribution plans should take the following steps to attempt to locate lost participants and beneficiaries:

- **Use Certified Mail.** Send a notice to participants using certified mail. Certified mail produces a tracking number, and a signature is required by the recipient in order to receive the notice. The signature is accessible to the plan sponsor for an additional fee, unless the plan sponsor previously paid for Certified Mail – Return Receipt Requested.
- **Check Related Plan and Employer Records.** Check the employer's records and the records of the employer's other plans (such as health or life insurance plans) to determine if they contain more updated information. If privacy is a concern, the administrator of the other plans may forward a letter from the terminating defined contribution plan.
- **Check With Designated Beneficiary.** Try to identify and contact any individual designated as a beneficiary under the plan (if there are privacy concerns, ask the individual to forward a letter from the plan).
- **Use Free Electronic Search Tools.** Use free internet search engines, public records, license, mortgage and real estate tax databases, obituaries, and social media.
- **Consider More Costly Search Steps Depending on the Facts and Circumstances.** FAB 2014-01 also instructs plan administrators of terminating defined contribution plans to also consider other search options, such as commercial locator services, credit reporting agencies, information brokers, investigation databases, and other similar services, depending on the size of the account balance and the additional cost of those search steps.

Winston Note: FAB 2014-01 is helpful guidance for administrators of terminating defined contribution plans, but more guidance is needed from the DOL on whether these same rules would apply to ongoing defined contribution and defined benefit plans. For example, would an ongoing plan be required to run the searches listed above every year while the participant remained missing?

With respect to ongoing defined contribution and defined benefit plans, the DOL Employee Benefit Security Administration (EBSA) recently implemented a national project to pressure plan sponsors into finding former employees so that their benefits can be distributed to them. This project targets plans with Annual Form 5500 filings that show a high number of terminated vested participants who are not receiving benefit payments or a lump sum payout. The DOL also has focused significant attention on this issue during routine plan audits.

Winston Note: A plan sponsor's failure to locate and contact a missing participant who is owed benefits can be deemed to be a breach of fiduciary duty under ERISA, which may trigger penalties and personal liability for plan fiduciaries. Problems can often arise when there are corporate changes or turnover of internal staff or external service providers, and information can get lost in the process. Given the potential penalties involved and the need for a coordinated response, it is a good practice to have a missing participants policy and designated persons within the organization who make regular efforts to keep participant information current. It is also good practice for the plan's fiduciaries, including committees who oversee the plan, to be alerted whenever a plan is notified that an audit has commenced. Plan fiduciaries should also consider notifying the plan sponsor's fiduciary liability insurer when a DOL audit is received. Plan administrators should have a process for following up on mail that is returned to the plan sponsor or third-party administrator, and should keep on an annual basis an "audit trail" of detailed records that document all efforts to locate missing participants and beneficiaries, which can be produced in the event of an audit.

At the August 24, 2017 meeting of the ERISA Advisory Council in Washington, D.C., Timothy Hauser, acting director of EBSA, stated that the DOL intended to give additional guidance regarding standards that plans should follow in following up on missing participants. In addition to the steps listed in FAB 2014-01, Mr. Hauser indicated that plan

administrators may also wish to solicit coworkers of missing participants for updated contact information, or try contacting participants at their last known telephone number, since many individuals keep the same cell number after moving.

Winston Note: Contacting coworkers of missing participants will generally be appropriate only under limited circumstances and with respect to specific types of employers, such as small companies or companies with employees concentrated in a particular geographic area. Larger employers with national or global operations or highly mobile workforces may find this recommendation to be unwieldy and costly, and it could also trigger related privacy concerns.

As the DOL has expanded its efforts to monitor and audit plan sponsors' attempts to locate missing participants and beneficiaries, the DOL has begun to broaden the scope of its audits to include references to the Code's RMD rules, moving increasingly into an arena that previously was enforced solely by the IRS. DOL auditors have cited to Code Section 401(a)(9) in audit findings, apparently with an intent to imply that a failure to locate missing participants who are age 70-1/2 may constitute a separate fiduciary breach in addition to a breach for failing to locate any missing participant. Some DOL auditors have attempted during the audit process to impose on plan sponsors the Code's 50% excise tax owed by plan participants who fail to receive RMDs under a plan. Other DOL auditors have indicated that defined contribution plan administrators have a "duty" to send targeted letters to all plan participants who reach normal retirement age under the plan, on an annual basis, informing them of RMD requirements and their ability to begin receiving benefits upon attainment of normal retirement age, despite the lack of any regulatory or other guidance that would require such communications. DOL auditors also have discussed penalizing sponsors of defined benefit plans who retain missing participants and their accrued benefits on plan census data after attainment of age 70-1/2.

Winston Note: Plan administrators should review their procedures for locating and making required RMD payments to participants. Plan sponsors may wish to adopt procedures to forfeit benefits for participants who cannot be located, after diligent efforts to find those participants have failed. Before benefits are forfeited, attempts to notify participants of the impending forfeiture must be made, such as through initial and follow-up letters describing the forfeiture process and mailed to the last known address, giving participants a reasonable amount of lead time to contact the plan administrator prior to the forfeiture. The plan must clearly provide for the forfeiture of missing participants' account balances into a defined contribution plan's forfeiture account, or into the pool of assets available for funding in a defined benefit plan. In addition, records must be maintained that would allow those benefits to be reinstated if the missing participant or beneficiary is later located.

IRS Guidance

Under IRS rules, auditors in the Department of Treasury's Employee Plans (EP) division can challenge a plan that fails to make RMDs to participants who have attained the requisite age for a failure to comply with IRC Section 401(a)(9).

In a bit of good news for plan sponsors, the Department of Treasury issued a memorandum (the "IRS Memo") on October 19, 2017, to EP auditors examining employer-sponsored retirement plans. The IRS Memo directs EP auditors not to challenge a qualified plan as failing to satisfy the RMD rules under Code Section 401(a)(9) if a plan sponsor can demonstrate certain actions were taken in order to locate a participant or beneficiary to whom benefits are owed.

The IRS Memo sets guidelines that prohibit EP auditors from challenging qualified plans with regard to missing participants if the plan sponsor has:

- Searched for alternative contact information in the plan, internally and through publicly-available records;
 - Used a commercial locator service, a credit reporting agency, or a proprietary internet search tool; and
 - Attempted to contact the participant via USPS certified mail to the last known mailing address and any other contact information, such as email and telephone number.
- The guidelines are applicable to all EP audits opened on and after October 19, 2017, and expire on October 19, 2019.

Winston Note: The recommendations in the IRS Memo for searching for missing participants generally follow those laid out in DOL FAB 2014-01, although the IRS procedures are a little more general and open-ended than the DOL procedures. Although the IRS Memo is directed at EP auditors rather than plan sponsors, it nonetheless provides helpful insight into what EP auditors will be looking for when examining RMDs. The IRS Memo can also be used to inform internal policies that describe the actions that should be taken in order to ensure compliance with RMD requirements and guide the creation of a record to document compliance.

PBGC Missing Participant Program

As a follow-up to the DOL's increasing attention to the issue of participants not receiving benefits in a timely way, the PBGC published a final rule in the *Federal Register* on December 22, 2017, expanding the PBGC's existing program to track and handle the benefits of missing retirement plan participants and beneficiaries.

Prior to the expansion, the PBGC's program applied only to retirement plan benefits of missing participants of terminated PBGC-insured defined benefit plans. The expanded program now includes most terminated defined contribution plans, terminated multiemployer plans covered by Title IV, and terminated professional service plans with 25 or fewer participants.

Beginning in January, terminating defined contribution plans now have the option of transferring missing participants' benefits to the PBGC instead of establishing an IRA at a financial institution. Participant accounts will not be diminished by ongoing maintenance fees or distribution charges, and the PBGC will pay out benefits with interest when participants are found. The enhanced program is intended to make it easier for people to locate their retirement benefits after their plan terminates. Because the expanded program is only open to plans that terminate on or after January 1, 2018, the PBGC expects it will be several months before new missing participant names are added to the existing online directory.

The major features of the PBGC's defined contribution plan program include:

- The program is voluntary. In lieu of sending funds to the PBGC, the plan may instead inform the PBGC that the benefit was transferred to an IRA custodian or other financial institution. (This reporting is also voluntary.)
- A one-time fee is applied (initially \$35 per participant, but waived for those with benefits of \$250 or less). This fee will also be applied to the existing program for defined benefit plans.
- Earnings are credited at the federal mid-term interest rate.

Payouts will be made in the form of an annuity (single or joint and survivor annuity) unless the participant, and spouse if married, file a consent to receive a lump sum payment.

The PBGC's December 21, 2017 release indicated that it coordinated with the DOL so that guidance regarding missing participants is consistent. However, to date, the DOL has not yet provided any formal guidance since FAB 2014-01.

Winston Note: While the PBGC's program expansion is a worthwhile effort, unless the program is also expanded to ongoing defined contribution plans, the value of the expanded PBGC missing participant program to most plan administrators seems limited.

As a result of heightened scrutiny by the DOL and IRS regarding payment of required minimum distributions and locating missing participants, we recommend that every plan sponsor look closely at its procedures for finding missing participants and distributing RMDs. Plan administrators of both defined contribution and defined benefit 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 IRS, and should keep detailed audit trails of the efforts made on an annual basis.

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