

Employee Benefits Update

May 6, 2021

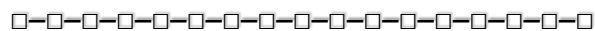
DOL Releases Guidance Regarding Missing Participants

Executive Summary

The Employee Benefits Security Administration (“EBSA”) of the Department of Labor (“DOL”) recently issued the following guidance highlighting certain issues that plan fiduciaries should consider when trying to locate and distribute benefits to missing or non-responsive participants:

- [Best Practices for Pension Plans](#): Describes best practices plan fiduciaries could adopt to minimize missing or nonresponsive participants
- [Compliance Assistance Release 2021-01](#): Outlines investigative processes and case-closing practices EBSA uses to conduct Terminated Vested Participants Project (“TVPP”) audits of defined benefit plans
- [Field Assistance Bulletin 2021-01](#): Authorizes plan fiduciaries of terminating defined contribution plans, such as 401(k) plans and 403(b) plans, to transfer account balances of missing or nonresponsive participants to the Pension Benefit Guaranty Corporation (the “PBGC”) Defined Contribution Missing Participants Program

While the guidance is not as formal as regulations might be, it is nevertheless welcome news and provides guidelines for plan fiduciaries to follow.



BEST PRACTICES FOR PENSION PLANS

The DOL’s “Best Practices” guidance outlines steps that fiduciaries of defined benefit plans and defined contribution plans should consider, based on practices EBSA has identified during investigations as effective at minimizing missing participants. The guidance also lists “red flags” that EBSA has identified as indications that a plan has a problem with missing or nonresponsive participants.

- ***Best Practices:***
 - Maintaining accurate census information for plan participants – contacting participants periodically to confirm or update contact information; following up on undeliverable mail/email or uncashed checks; regularly auditing census information; and correcting data errors.

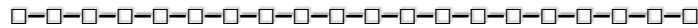
- Implementing effective communication strategies – using plain language and offering non-English assistance when appropriate; encouraging contact through plan/plan sponsor websites; and confirming or updating contact information as part of the onboarding and exit processes.
 - Searching for missing participants – checking related plan and employer records for participant, beneficiary, or other contact information; using free online search engines or commercial locator services; using certified mail (or private delivery services with similar tracing features); publishing a list of missing participants on the company’s intranet; reaching out to colleagues of missing participants; and searching on social media.
 - Documenting procedures and actions – maintaining the plan’s policies and procedures in writing; documenting steps taken to locate participants and any key decisions; and working with recordkeepers to identify and correct shortcomings in the plan’s practices.
- **Red Flags:**
 - More than “a small number” of missing or non-responsive participants, or of terminated vested participants who have reached normal retirement age but have not started receiving pension benefits.
 - Missing, inaccurate, or incomplete contact information and/or census data (*e.g.*, incorrect, or out-of-date mailing addresses, email addresses, or other contact information, partial social security numbers, missing birthdates, missing spousal information, or use of placeholder entries).
 - Absence of sound policies and procedures for handling returned mail marked “return to sender”, “wrong address”, “addressee unknown”, or otherwise undeliverable email.
 - Absence of sound policies and procedures for handling uncashed checks (as reflected, for example, by the absence of an accounting journal or similar record of uncashed checks, a substantial number of stale uncashed distribution checks, or failure to reclaim stale uncashed check funds in distribution accounts).

COMPLIANCE ASSISTANCE RELEASE 2021-01

Compliance Assistance Release 2021-01 describes EBSA’s approach for TVPP audits of defined benefit plans, which includes looking for systematic errors in recordkeeping, inadequate procedures for identifying and locating missing participants, and inadequate procedures for addressing uncashed distribution checks, and also examining contracts with third-parties that perform searches for missing participants on the plan’s behalf. This guidance is helpful for employers who may be preparing for a DOL investigation.

FIELD ASSISTANCE BULLETIN 2021-01

Field Assistance Bulletin 2021-02 announced that the DOL will temporarily suspend enforcement action against fiduciaries of terminating defined contribution plans that transfer missing or nonresponsive participants' account balances to the PBGC's Defined Contribution Missing Participants Program rather than to an IRA, certain types of bank accounts, or to state unclaimed property funds, if the fiduciaries comply with the guidance provided in the bulletin, and otherwise act in good faith. The temporary suspension remains in place only until further notice, and notably does not preclude the DOL from pursuing violations against plan fiduciaries who fail to diligently search for participants and beneficiaries prior to the transfer of account balances to the PBGC, or who fail to maintain plan and employer records.



To discuss the DOL's missing or nonresponsive participant guidance, or other employee benefits matters, please contact any member of our Employee Benefits and Executive Compensation Group below.



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