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Department of Labor Issues Missing Participant Guidance for Retirement Plans

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The Department of Labor (DOL) has issued long-awaited guidance on what it views as appropriate procedures for retirement plans to locate missing or nonresponsive participants. Plan sponsors and fiduciaries of all retirement plans, but especially defined benefit pension plans, should review and update their policies and procedures for communicating with terminated vested participants and locating missing participants carefully in view of this guidance.

The DOL's new missing participants guidance takes the form of (i) a summary of what the DOL considers best practices for locating missing participants of defined benefit pension plans, the (iii) DOL's approach for missing participant issues under audits or investigations, and (iii) a temporary enforcement policy for locating missing participants in terminating defined contribution plans.

Background

For several years, the DOL has focused as an enforcement matter on the steps that retirement plans take to locate "missing participants" who are due benefits under the plan. In a 2019 press release, the DOL announced that its missing participants initiative (known as the "Terminated Vested Participant Project") has helped participants collect over $1.5 billion in benefits from plans. However, the DOL had not previously issued guidance on the steps that retirement plans should take to obtain accurate contact information for former employees who are due benefits, except in limited situations, such as for terminating plans.

The DOL's new guidance is more expansive than a previous IRS field directive, which directed IRS agents not to challenge failures to distribute required minimum distributions to participants if the plan had (i) taken appropriate steps to search the plan's and the plan sponsor's records and other publicly available information for the participant, (ii) used a commercial locator service, credit reporting agency or a proprietary internet search tool to locate the individual, and (iii) attempted to contact the individual through certified mail at the individual's last known address.

Best Practices for Addressing Missing and Nonresponsive Participants

As part of its new guidance, the DOL released a summary of what it considers "best practices" for pension plans for addressing missing or nonresponsive participants. This summary identifies a number of red flags for missing participant issues, including when there is a significant number of terminated vested participants who have attained normal retirement age without commencing their benefits or when there is a lack of policies and procedures for handling returned mail.

In the DOL's view, a sound fiduciary process requires ongoing efforts to keep contact information in census files up to date rather than waiting to rely on participant searches when participants are determined to be missing or nonresponsive. The DOL has provided examples of what it considers best practices, including the following:

Updating Census Files. Plans should ensure that they have accurate census information for all participants and beneficiaries. These activities include periodically confirming contact information, including requests that participants update their contact information in plan communications, following up on undelivered mail and uncashed checks, and regularly auditing census information for data issues.

Effective Communications Strategies. Plan communications should be clear so that participants understand their purpose and the participant's eligibility for distributions. Participants should also be encouraged to contact plan representatives through websites or toll free numbers to discuss questions. The DOL has found that missing participant issues are common when pension benefits have transferred to a new sponsor due to mergers and acquisitions, and so the DOL encourages marking envelopes to identify the original plan sponsor or plan clearly for terminated participants whose benefits have transferred.

Missing Participant Searches. Plans may check employment records or contact emergency contacts or designated beneficiaries to request contact information regarding missing participants. Plans may also attempt to use certified mail to the last known address, use free or commercial search services or credit reporting services.

Document Procedures. Plans should have documented policies and procedures for locating missing procedures and work with recordkeepers to ensure that appropriate procedures are in place and are being followed.

The DOL's complete list of best practices is available at: link.

Investigation/Audit Guidance

As part of the guidance, the DOL also issued Compliance Release No. 2021-01, which takes the form of a memorandum to regional directors on standardizing the approach for missing participants under investigations or audits. This memorandum addresses the following items:

Audit Triggers. The DOL may initiate an audit or investigation when there are a large number of terminated vested participants reported on a plan's Form 500 filings, when the plan sponsor is facing bankruptcy or has been involved in a merger or acquisition, or when the DOL is contacted by participants seeking assistance when they have not been afforded the opportunity to claim their benefits.

Information Requested. In order to review missing participants issues, DOL investigators will request copies of plan documents and amendments to understand distribution rules, as well as census records and actuarial reports. Investigators will also review procedures for communicating with terminated vested participants and for addressing missing participant issues.

Errors Identified. The DOL will review for systemic issues in administering benefits of terminated vested participants. These include errors in recordkeeping and administrative records, such as incomplete data in census files, or inadequate procedures for contacting terminated vested participants regarding their eligibility for benefits, for searching for missing participants, and for addressing uncashed distribution checks.

Closing the Investigation. Investigators will notify fiduciaries of the DOL's findings regarding missing participants and discuss appropriate measures to remedy any deficiencies. The DOL will issue a Voluntary Compliance letter that addresses missing participants as a general matter, but which does not cite individual fiduciaries for breaches "absent especially substantial errors or widespread

fiduciary breaches." (The memorandum does not address what factors investigators should use to differentiate ordinary "systemic issues" from "especially substantial errors.") Fiduciaries will have the opportunity to respond to the DOL's findings in the Voluntary Compliance letter and to discuss the appropriate resolutions. The DOL will generally cite any corrective actions that the fiduciaries have taken when closing out the case.

Use of PBGC Missing Participants Program for Terminating Defined Contribution Plans

The DOL has previously issued guidance providing a fiduciary safe harbor in the context of a terminating defined contribution plan that allows transferring accounts to an IRA, certain bank accounts or to a state unclaimed property fund in certain circumstances. Since this guidance was issued, the PBGC expanded its "Missing Participants Program" to allow terminating defined contribution plans to transfer accounts of missing or nonresponsive participants to the PBGC for a flat fee upon plan termination or, alternatively, to notify the PBGC regarding how the plan has disposed of these accounts.

Field Assistance Bulletin 2021-01 announces a temporary enforcement policy under which the DOL will not challenge a fiduciary breach for transferring accounts of missing participants under the PBGC's Missing Participants Program. However, the temporary enforcement policy does not restrict the DOL from challenging that a diligent search was not performed before transferring accounts to the PBGC.