"You're Gonna Miss Me When I'm Gone:" Missing Participants – Employer Retirement Plan Responsibilities | Fiduciary Focus Series

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Pension plan and 401(k) plan fiduciaries, including employers who are the plan administrators under the Employee Retirement Income Security Act of 1974 (ERISA), have a plethora of obligations to their retirement plans, many of which lead to head-scratching and confusion. One difficult responsibility placed on plan fiduciaries is to locate and distribute vested retirement benefits to missing or non-responsive plan participants (collectively, Missing Participants). For example, locating a participant who the employer no longer employs, no longer lives at the same address, and did not provide a forwarding address often causes plan fiduciaries trouble when attempting to distribute benefits. Even more perplexing are the participants who are located, receive a check, but fail to cash it. Regardless of the difficulty of addressing the issues posed by Missing Participants, plan fiduciaries are subject to stringent fiduciary rules within ERISA and therefore should take measures to understand and comply with the rules and regulations. After all, the central purpose of qualified retirement plans is to provide retirement income.

Over the past decade, the retirement community has been increasingly concerned with the challenges posed by Missing Participants and the lack of guidance providing fiduciaries a roadmap to compliance on this issue. In fact, the 2013 ERISA Advisory Council[1] recommended that the Department of Labor (DOL) develop industry best practices, update and issue guidance addressing Missing Participant issues, and work with other governmental agencies to create a coordinated approach to the Missing Participant issue. Some DOL guidance has emerged in the intervening years, namely Field Assistance Bulletin No. 2014-01

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which discussed how fiduciaries should resolve their Missing Participant issues, but significant gaps remained.

On January 12, 2021, the DOL issued three pieces of guidance on the Missing Participant issue. The first describes "red flags" that signify a plan fiduciary might have issues with Missing Participants and sets forth the DOL's suggested best practices to remedy the issues. The second piece of guidance discusses the Employee Benefits Security Administration's (EBSA) procedures when conducting Terminated Vested Participants Project (TVPP) audits. This guidance helps plan fiduciaries because it can serve as somewhat of a preparatory guide for cooperating with the EBSA if your plan is subject to a TVPP audit. Finally, FAB No. 2021-01 provides plan fiduciaries an opportunity to voluntarily transfer distributions from a terminating individual account plan or abandoned plan to the Pension Benefit Guaranty Corporation's (PBGC) Missing Participants Program without fear of being targeted for a violation of ERISA section 404(a).

Each of these pieces of guidance, when taken collectively, demonstrate an effort on the part of the DOL to target *current* plan procedures that ultimately lead to *future* issues with Missing Participants. In other words, current actions that plan fiduciaries take to minimize Missing Participant issues in the future are as important as the actions they take to find Missing Participants once the issue arises. The new guidance is discussed below.

The DOL's Best Practices for Locating and Dealing with Missing Participants

The DOL recognizes that the first step in addressing a problem is recognizing that the problem exists. The DOL recommends watching for these "red flags" when considering whether a plan may have an issue with Missing Participants:

- More than a small number of Missing Participants;
- More than a small number of terminated participants who have reached retirement age who are not receiving their vested benefits;
- Inaccurate contact information or census data for the plan and its participants;

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- Absence of policies and procedures for handling undeliverable mail (*g.*, mail that is returned with a "return to sender" or "wrong address"); and
- Absence of policies and procedures for handling uncashed checks.

If these "red flags" are present in your plan, the DOL has a list of broad suggestions that leave a lot of discretion for plan fiduciaries.

For example, to maintain accurate census information for the plan's participant population, the DOL recommends taking steps such as including contact information change requests in plan communications for easy access for participants, following-up with participants whose mail was deemed undeliverable, and regularly requesting updated contact information for all plan participants. Many recordkeepers have a report listing undeliverable mail available to the employer that administers the plan, but an employer who is also the plan administrator is the ERISA fiduciary responsible for checking that list and taking steps to locate Missing Participants. Some recordkeepers take basic steps (but not all required steps) to locate Missing Participants under the terms of their service agreement with the employer, but many do not.

To lower the rate of Missing Participants that are caused by a terminated employment, the DOL recommends taking steps such as providing exit paperwork for the employee to complete upon termination, which provides the plan administrator the requisite information to keep track of the terminated employee (*e.g.*, current address, new employer). Along the same lines, the DOL notes that it is vital for plan administrators to make a strong effort to locate Missing Participants by checking with designated plan beneficiaries, the participant's emergency contacts, and using free online search engines, public record databases, and social media.

One particularly useful recommendation is that, in the context of a change in recordkeepers or a business merger or acquisition, plan sponsors or plan fiduciaries should address the transfer of appropriate plan information (*e.g.*, participant and beneficiary contact information) and relevant employment records (*e.g.*, next of kin) as part of the due diligence process. Additionally, in the context

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of acquired plans, plan sponsors or plan fiduciaries should consider asking for documentation regarding the plan's efforts with respect to Missing Participants.

Importantly, the DOL recognizes that not every "best practice" is appropriate for every plan. Instead, the DOL acknowledges that it may be more appropriate for plan fiduciaries to perform a cost-benefit analysis to determine the most appropriate measures to adopt for their respective plans. In addition, the guidance suggests that the specific measures undertaken to locate a Missing Participant could depend on the size of the benefit or account at issue. This ostensibly provides plan fiduciaries broad discretion in dealing with Missing Participants. However, the guidance also might be used by the DOL in future TVPP audits as a baseline requirement for plan fiduciaries.

Finally, the DOL emphasizes the importance of documenting a plan's policies and procedures and the steps and actions taken to implement the policies.

Compliance Assistance Release No. 2021-01: TVPP Audit Procedures

To assist plan fiduciaries in their cooperation efforts with the EBSA in relation to defined benefit plan TVPP audits, the DOL issued this guidance to detail the purpose of the TVPP audits and the measures plan fiduciaries should take when audited. The three-fold purpose of the TVPP audits is to ensure that plans:

- maintain adequate census information to keep track of participants;
- have appropriate procedures in place for advising participants with vested accrued benefits of their eligibility to apply for benefits at retirement and of the date by which they must begin withdrawing minimum required distributions; and
- have appropriate procedures in place to make a good-faith effort to search for terminated participants and beneficiaries for whom they have incorrect information on file.

In determining which plans are ripe for a TVPP audit, the DOL looks at which plans appear to have a systematic issue with plan

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administration, especially when it comes to tracking terminated vested participants and beneficiaries and distributing their benefits in a timely manner. The guidance specifically references the plan's Form 5500 filing as a potential source of the number of terminated vested participants.

Upon initiating a TVPP audit, the DOL will request various documents from the plan administrator, including the plan documents, participant census records, and any existing plan procedures for communicating with Missing Participants and related data (*e.g.*, returned mail records).[2] Throughout the audit, the DOL is generally looking for plan failures that increase the risk of participant losses. The DOL also lists certain practices that it views as insufficient (*e.g.*, failing to use search or locator services offered by a plan's recordkeeper). It is critical to respond to all DOL audit communications in a timely manner. Adding a reference to the appropriate contact in the plan administrator name and address box on the Form 5500 helps ensure mail is quickly routed to the correct person within the plan fiduciary's organization (*e.g.*, "Attn: Director of Human Resources").

At the conclusion of the TVPP audit, an EBSA Voluntary Compliance letter is issued to the plan that addresses potential ERISA violations. As long as the problems indicated in the letter are not "especially substantial errors or widespread fiduciary breaches" and the plan fiduciaries provide appropriate remedies for affected individuals and correct any flaws in their policies, the DOL will not cite individual plan fiduciaries with specific ERISA violations.

Nevertheless, this guidance clarifies that the DOL expects to find appropriate fiduciary procedures in place to minimize the issues with Missing Participants from defined benefit plans. Notwithstanding that this guidance is focused on defined benefit plans, from a practical perspective, the lessons here could equally apply in a defined contribution context.

Field Assistance Bulletin No. 2021-01

The final piece of related DOL guidance is FAB 2021-01, which expands the fiduciary safe harbor under 29 CFR 2550.404a-3 for distribution to Missing Participants in terminating and abandoned

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defined contribution account plans. The safe harbor previously permitted distribution of vested benefits to an individual retirement account or annuity (IRA) in these cases. The new guidance now permits the funds to be transferred to the PBGC's expanded Missing Participants Program as an alternative to transferring the funds to an IRA. This Missing Participants Program, established in 2017, is meant to hold retirement benefits for Missing Participants and beneficiaries of terminating and abandoned defined contribution plans and help them locate and obtain those funds.

Given the DOL's focus on Missing Participants and its prediction that the economic disruption stemming from the COVID-19 pandemic will exacerbate the issue, it is an opportune time for plan administrators to look at their Missing Participants' practices and procedures and determine if they are sufficient or should be beefed up. It is clear that the DOL intends to increase its attention to plan failures relative to Missing Participants; therefore, engaging in this determination sooner rather than later would be wise.

If you have any questions regarding ERISA compliance or would like help bringing your plan procedures and policies up-to-par with these DOL guidelines, please contact Sarah Lowe, Edward Rivin, or any other attorney with Frost Brown Todd's Employee Benefits & ERISA team.

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[1] Formerly, the Advisory Council on Employee Welfare and Pension Benefit Plans.

[2] The DOL reports that certain plans and service providers require a subpoena before they will produce protected personal information due to privacy and other concerns.

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