

NEW MISSING PARTICIPANT GUIDANCE FROM THE DOL

Hodgson Russ Employee Benefits Newsletter
March 8, 2021

In January, the U.S. Department of Labor (DOL) published a three-part package of sub-regulatory guidance addressing the topic of missing plan participants. Administering retirement plan distributions with respect to missing participants and uncashed checks has been a vexing challenge for plan administrators, particularly because missing participants draws the attention of government investigators and examiners, and because there has been a dearth of comprehensive guidance on the topic from either the DOL or the Internal Revenue Service (IRS). However, government investigators and examiners have learned through their routine audit and investigatory reviews of retirement plans that plan sponsors and service providers do not always have sufficient practices and procedures for tracking participants when they leave employment, communicating with participants about their eligibility for benefits, locating participants who are missing, and dealing with participants who are unresponsive.

DOL and IRS guidance that has been available on this topic has trickled out in bits and pieces over a period of years, despite regular calls from plan sponsors, service providers and ERISA practitioners for comprehensive guidance. The guidance published by the DOL in January is the latest installment of missing participant guidance promulgated by the DOL. While the guidance is not legally binding and might not be as comprehensive as many were hoping for, it does offer some helpful insights on what practices and procedures plan administrators and service providers should be considering to prudently manage the challenge of distributions for missing and nonresponsive participants.

There are three components to the DOL's most recent sub-regulatory guidance on the subject of missing plan participants:

A publication entitled “Missing Participants – Best Practices for Pension Plans”

The *Best Practices* publication issued by the DOL's Employee Benefits Security Administration (EBSA) includes a list of certain circumstances that can be indicative of a potential problem with missing or nonresponsive participants:

- More than a small number of missing or nonresponsive participants.
- More than a small number of terminated vested participants who have reached normal retirement age but have not started receiving their pension benefits.

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- Missing, inaccurate, or incomplete contact information, census data, or both (e.g., incorrect or out-of-date mail, email, and other contact information, partial social security numbers, missing birthdates, missing spousal information, or placeholder entries).
- Absence of sound policies and procedures for handling mail returned marked “return to sender,” “wrong address,” “addressee unknown,” or otherwise, and 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).

The *Best Practices* publication goes on to provide an extensive list of helpful practices EBSA believes have proven effective at minimizing and mitigating the problem of missing or nonresponsive participants. The practices apply equally to both defined benefit and defined contribution retirement plans. And because plan fiduciaries ultimately have fiduciary obligations under ERISA to missing participants, the *Best Practices* publication also stresses that those fiduciary obligations fully apply even if a plan conditionally forfeits the benefits of a missing participant, as is permitted under the Treasury Regulations – the plan fiduciaries have an obligation to keep accurate records and take appropriate steps to ensure that the participants and their beneficiaries are paid their full benefits when due.

This article does not list all the practices listed in the *Best Practices* publication, but they fall under four broad headings:

- Maintaining accurate census information for the plan’s participant population. Eight specific practices are listed that focus on procedures for periodically contacting participants and beneficiaries for the purposes of maintaining and updating census and contact information.
- Implementing effective communication strategies. Six specific practices are listed that focus on having a sound set of communications to help participants and beneficiaries understand when they are eligible to start plan benefit payments and the importance of confirming and updating their contact information.
- Missing participant searches. Ten different strategies for locating missing participants are listed (checking related plan and employer records, checking with designated plan beneficiaries and the individual’s emergency contacts, using free online search engines, using a commercial locator service, etc.).
- Documenting procedures and actions. Three specific practices are listed for plans to document their missing participant policies and procedures, to document action steps to implement those policies and procedures, and to coordinate those documentation efforts with third party record keepers.

The *Best Practices* publication acknowledges that not every one of the listed best practices is necessarily appropriate for every plan. Plan fiduciaries are expected to prudently consider which practices will yield the best results in a cost effective manner for their plan’s particular participant population.

The *Best Practices* publication is available [here](#).

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Compliance Assistance Release 2021-01

The Release is an internal memorandum that has been made public and outlines the general investigative approach that guides all of EBSA's Regional Offices that are conducting Terminated Vested Participants Project (TVPP) audits; it is also intended to facilitate voluntary compliance efforts by plan fiduciaries. TVPP audits of defined benefit plans have been an ongoing EBSA initiative. EBSA reports that the TVPP audits have been instrumental in helping missing and nonresponsive participants recover billions of dollars in pension plan benefits.

TVPP audits are intended to ensure that defined benefit pension plans:

- Maintain adequate census and other records necessary to identify and locate participants and beneficiaries due benefits under the plan, to determine the amount of those plan benefits, and to determine when participants and their beneficiaries are eligible to commence benefits;
- Have appropriate procedures for advising terminated vested participants (TVPs) of their eligibility to apply for benefits as they near normal retirement age, as well as the date they must start required minimum distributions (RMDs);
- Implement appropriate search procedures for TVPs and their beneficiaries for whom they have incorrect or incomplete information.

The Release provides a fairly detailed overview of a TVPP audit process, including:

- The classes of records and documents to be requested to help analyze potential problems a pension plan might have with recordkeeping or administration of benefits for TVPs and their beneficiaries.
- The errors an EBSA investigator is looking for to determine whether there are systemic issues in the plan's administration of TVP benefits, including:
 - Systemic errors in plan recordkeeping and administration that create a risk of loss associated with TVPs or their beneficiaries failing to timely enter pay status;
 - Inadequate procedures for identifying and locating missing TVPs and their beneficiaries;
 - Inadequate procedures for contacting TVPs nearing normal retirement age to inform them of their right to commence payment of their benefits;
 - Inadequate procedures for contacting TVPs and the beneficiaries of deceased TVPs who are not in pay status at or near the required beginning date for commencing minimum required distributions;
 - Inadequate procedures for addressing uncashed distribution checks.

The investigator will review the plan census and other records for "red flags" that signal missing participants or incomplete participant data, including obvious data placeholders for missing or incomplete data, returned mail records, more than a small number of terminated vested participants who are eligible to claim benefits and have not done so. Other practices that can suggest a plan's procedures for dealing with TVPs are insufficient include, for example, continuing delivery of required communications to a known "bad address" without taking steps to verify the correct address, or using benefit notices to TVPs/beneficiaries that do not clearly explain in plain English the recipient's right to pension benefits or the consequences of not commencing benefits.

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- EBSA's approach to closing cases where EBSA finds systemic errors in plan records that have hindered TVPs, spouses or other eligible beneficiaries from claiming benefits. Investigators are being advised to promptly inform the responsible fiduciaries of the agency's findings and invite them to discuss how they can remedy the identified problems. EBSA's stated aim is to help the plan find as many adversely affected participants and beneficiaries as possible and help the plan fashion an appropriate remedy for each affected individual. EBSA also will ask the plan to take appropriate corrective actions regarding their policies and practices regarding missing participants. In many cases, if the responsible plan fiduciaries provide appropriate remedies for affected individuals and correct any flaws in their recordkeeping, communication, search and other relevant policies, EBSA will recite those corrective steps, without citing the individual plan fiduciaries for specific violations of ERISA when closing out a case.

The published Release offers valuable insight into the standards EBSA will apply as part of a TVPP audit and can further assist defined benefit plans in shaping their practices and procedures for administering TVP benefits.

The Release is available [here](#).

Field Assistance Bulletin 2021-01

The Pension Benefit Guaranty Corporation's (PBGC) Missing Participants Program (the Program) was originally established by the PBGC to hold the benefits of missing participants under terminating defined *benefit* pension plans. In 2017, the Program was expanded to also encompass terminating defined contribution plans. The expanded Program represents one of two options terminating defined contribution plans fiduciaries have for addressing distributions missing or nonresponsive participants. The other option is a pre-existing fiduciary safe harbor under DOL regulations that permits a terminating defined contribution plan to transfer the benefits of missing participants to an IRA, certain bank accounts, or to a state unclaimed property fund, subject to satisfying certain notice requirements and meeting other conditions. But the fiduciary safe harbor has not been updated yet to cover transfers by terminating defined contribution plans to the PBGC under the Defined Contribution Missing Participants Program.

Field Assistance Bulletin 2021-01 (the FAB) announces a temporary enforcement policy for *terminating defined contribution plans*' (e.g., 401(k) plans) use of the PBGC's Defined Contribution Missing Participants Program. Until further guidance is made available, the DOL will not pursue violations of ERISA fiduciary standards against the responsible plan fiduciaries of terminating defined contribution plans in connection with the transfer of a missing or nonresponsive participant's or beneficiary's account balance to the PBGC Program rather than to an IRA, certain bank accounts, or to a state unclaimed property fund, as specified in the DOL fiduciary safe harbor, as long as the transfer to the Program meets certain conditions including the following:

- The responsible fiduciary still must act in accordance with a good faith, reasonable interpretation of ERISA's fiduciary standards.
- The temporary enforcement policy does not relieve the responsible plan fiduciary from its obligation to diligently search for participants and beneficiaries prior to the transfer of their account balances to the PBGC Program, or its obligation to maintain plan and employer records.
- The responsible plan fiduciary must otherwise comply with the requirements of the fiduciary safe harbor, except that the content of the notice to participants and beneficiaries must be modified to reflect the transfer to the PBGC. Notices to

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participants and beneficiaries must state clearly that their account balances are being transferred to the “Pension Benefit Guaranty Corporation’s Defined Contribution Missing Participants Program,” and include the PBGC’s website address and customer contact number.

- The responsible plan fiduciary may pay the applicable PBGC fee from the transferred account, unless the plan terms prohibit such payment.
- The DOL encourages plan fiduciaries who do not elect to transfer account balances to the PBGC to participate in the PBGC Defined Contribution Missing Participants Program by voluntarily electing to notify the PBGC about the disposition of the account balances of all or some missing participants.

Note that the FAB also is applicable to qualified termination administrators (QTA) of abandoned defined contribution plans.

The FAB is available [here](#).