DOL Guidance for Retirement Plan Fiduciaries in Search of Missing Participants

By Sharon L. Lippett

April 2021

The U.S. Department of Labor ("DOL") recently issued important guidance ("Guidance") for retirement plan sponsors and fiduciaries on their obligations to find missing participants entitled to retirement plan benefits. Retirement plan sponsors and fiduciaries are at greater risk given the uptick in missing participant audits by the DOL. (More information on missing participant audits is available here.)

The Guidance generally addresses the following three components of missing participant issues facing retirement plan sponsors and fiduciaries: (1) locating terminated vested participants in defined benefit plans, (2) best practices for managing missing participants, and (3) participation in the Pension Benefit Guaranty Corporation's ("PBGC's") Missing Participants Program for terminating defined contribution plans. The DOL states that the Guidance does not have the force and effect of law and is intended only to clarify existing requirements.

A summary of the three components of the Guidance follows:

(1) Compliance Assistance Release 2021-01 ("Compliance Release"). In the Compliance Release, the DOL describes its Terminated Vested Participants Project for defined benefit plans ("TVPP"), which is an investigative process focusing on defined benefit plans that appear to have continuing issues with distribution of benefits to terminated vested participants ("TVPs"). Signs of such continuing issues include a large number of terminated participants who are entitled to future benefits and the plan sponsor's involvement in a merger or acquisition.

When opening a TVPP investigation, the DOL explains that it requests various documents from the fiduciary, including the plan, the summary plan description, participant data, actuarial reports, and written plan procedures for locating and contacting missing participants. If the plan fiduciary does not produce the requested documents by the response date, the DOL may issue a subpoena to compel production of the documents.

The Compliance Release states that the DOL looks for "red flags," such as inadequate procedures for (i) locating missing participants, (ii) contacting terminated employees who are eligible to begin payment of plan benefits, and (iii) addressing uncashed checks. By way of example, the DOL states that employee notices that do not provide the date as of which the individual is eligible for benefits or the excise tax that will be due on delayed required minimum distributions can exacerbate a TVP problem. Additionally, the DOL has found that mergers, acquisitions, and corporate name changes increase the likelihood that participants will ignore mail addressed to them from a company for which they believe they never worked.

If a TVPP reveals systemic errors, the DOL states that it will ask the plan fiduciary to take corrective actions. If the plan fiduciary takes appropriate action, the DOL indicates that it generally will not cite the plan fiduciary for specific violations of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), when closing out a case.

(2) Missing Participants—Best Practices for Pension Plans ("Best Practices Summary"). The Best Practices Summary outlines best practices applicable to both defined benefit and defined contribution plans, which the DOL states fiduciaries can follow to ensure that plan participants receive the benefits to which they are entitled. The DOL acknowledges that the Best Practices Summary includes "some" of the practices used by well-run plans, but that not every practice listed in the summary is appropriate for every plan. The Best Practices Summary includes numerous practices for (i) maintaining accurate census information, (ii) implementing effective communication strategies, (iii) conducting searches for missing participants, and (iv) documenting procedures for, and actions to, locate missing participants.

(3) Field Assistance Bulletin 2021-01 ("FAB"). In the FAB, the DOL announces a temporary enforcement policy for terminating defined contribution plans that use the PBGC Missing Participants Program. The Missing Participants Program permits fiduciaries of terminating defined contribution plans to transfer the accounts of missing participants to the PBGC, which may increase the likelihood of these participants receiving their benefits. However, a transfer to the PBGC is not covered under the DOL's fiduciary safe harbor for terminating defined contribution plans, which generally requires that distributions be rolled over to an individual retirement account or annuity ("Safe Harbor"). For this reason, the FAB states that that the DOL will not pursue violations for breach of fiduciary duty under Section 404(a) of ERISA against plan fiduciaries of terminating defined contribution plans that use the Missing Participants Program, rather than the Safe Harbor.

The DOL conditions this relief on the fiduciary's compliance with the FAB and reasonable good faith interpretation of Section 404 of ERISA with respect to matters not addressed in the FAB. The FAB requires, among other things, that plan fiduciaries that participate in the Missing Participants Program otherwise comply with the Safe Harbor and notify participants that their accounts have been transferred to the PBGC.

Considerations and Next Steps for Plan Fiduciaries

Since the Guidance does not have the force of law, the extent to which the DOL will enforce the Guidance in connection with a TVPP investigation or other audit is unclear. Nevertheless, compliance with the Guidance, to the extent practicable, may mitigate any risk related to such investigations and audits, as well as assist plan fiduciaries in developing procedures for finding missing participants.

To comply with the Guidance, fiduciaries should take the following steps:

- Determine if the retirement plan exhibits red flags indicating a problem with missing or non-responsive participants.

- Using the DOL's list of best practices in the Best Practices Summary as a guide, establish a policy and procedures to identify and locate missing and non-responsive participants.

- Provide written notices to the missing participants, once located, that include complete information on the plan benefit so that payment of their benefits can commence as soon as practicable, in accordance with plan terms.

- Document efforts to identify and locate missing and non-responsive participants and to pay their plan benefits.

*   *   *

For more information about this Client Alert, please contact:

Sharon L. Lippett
New York
212-351-4630
slippett@ebglaw.com