

DOL Outlines What To Do When Retirement Savers Go Missing

By **Emily Brill**

Law360 (January 13, 2021, 3:25 PM EST) -- Retirement plan managers who lose track of beneficiaries will have an easier time avoiding ERISA violations now that the U.S. Department of Labor has issued eleventh-hour guidance on how to search for investors who've dropped off a plan's radar.

Attorneys welcomed the Trump administration's new Employee Retirement Income Security Act guidance for connecting retirees with their benefits, but they lamented that Tuesday's documents arrived roughly a half-dozen years after the agency began investigating plan managers over the issue of what the DOL calls "missing plan participants."

"It is good to see that DOL is finally providing guidance to the regulated community after seven years of investigations," said Kevin Walsh, a principal at Groom Law Group who works on benefits matters.

Those probes often ended with DOL investigators telling plan managers that the managers' methods for locating missing plan participants placed them out of compliance with ERISA, which frustrated plan caretakers, because they weren't told what their procedures should be, attorneys said.

"The frustration was that there wasn't guidance," said Elizabeth Goldberg, a benefits partner at Morgan Lewis & Bockius LLP. "It seemed punitive to make findings of fiduciary breaches where there was no existing guidance."

The DOL's new guidance arrived in three parts: a list of best practices for locating and tracking beneficiaries; a compliance assistance document describing the DOL's missing-participant investigations; and a field assistance bulletin temporarily letting managers of abandoned or insolvent retirement plans off the hook for missing-participant-related ERISA violations.

Because the field assistance bulletin only applies to a subset of plan managers, the most widely applicable documents are the best practices list and compliance assistance document, attorneys said.

The best practices list enshrines many of the recommendations that the DOL made informally to plan managers during missing-participant investigations, said benefits attorney George Sepsakos, a principal at Groom Law familiar with these probes.

The DOL noted that "not every practice" included on the list "is necessarily appropriate for every plan," and that the guidance is not legally binding.

The recommendations include contacting workers and retirees regularly to confirm or update their contact information; using plain language in outreach and offering assistance to non-English speakers; and engaging in diligent searches for missing participants by calling their emergency contacts and searching for their new contact information on the internet.

When plan managers are looking for participants they've lost track of, they need to balance their need to find the retiree with their need to protect the retiree's benefits from potential identity theft, said Goldberg, the Morgan Lewis attorney.

"Let's say you engage in the internet search — that's not a bad idea, that's something that makes sense to do. Depending on how common the name is, you could, in theory, generate a hit for a different individual with the same name. How much do you disclose when you call the person regarding the benefit?" Goldberg asked, noting that the best practices list was silent on this point.

Groom Law's Walsh took issue with the best practices list's recommendation that plan managers reach out to the retiree's old co-workers, saying that outreach "could be perceived as creepy." He also thought the list was missing an obvious tip.

"At bottom, DOL misses the most cost-effective way to locate participants: place some of the burden on the participants who want to receive benefits to update their former employers about their current addresses," he said.

The list also lacked advice on what plans should do when a missing participant has reached an age — say, 150 — where they're almost undoubtedly no longer alive, Goldberg said.

"Some of the people on the rolls are literally older than the oldest person in the world, so it's probably fair to assume they're dead," Goldberg said. "Wouldn't it be fair to conclude that you don't need to search anymore?"

Despite identifying some shortcomings with the best practices list, Walsh and Goldberg emphasized that they were glad to see the DOL release guidance on how plans should handle their missing participants.

Goldberg especially praised a note in the compliance assistance document saying that missing-participant investigations shouldn't end in individual plan caretakers getting slapped with ERISA violations unless they've committed "especially substantial errors," as the DOL put it.

"I think it's a good thing that this guidance is out," Goldberg said. "I would recommend whether clients are under investigation or not, that they look at this because it does provide a road map as to the DOL's views on what a fiduciary should do to comply with their ERISA duties on missing participants."

--Editing by Abbie Sarfo.