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Deciphering the DOL Best Practices for Missing Participants

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Agenda

Welcome and Introductions

Background on Missing Participant Issue

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Observations and Considerations for

- Plan Sponsors
- Service Providers

Q & A

Background on Missing Participant Issue

Missing Participant Challenge – Background

Long-standing problem with a recent focus from government agencies

- Federal agencies, Congress, Government Accountability Office, state insurance regulators

Issue for all plans, but large, complex DB plans that combine multiple legacy plans face the most challenges.

- Generally, deferred vested participants cannot commence benefits until normal retirement age (or early retirement age in some cases).
- 30+ year gaps between termination and commencement—plenty of time for participants to get lost.
- Absence of good records and pension files from old acquisitions and plan mergers compound problem.

Different Types of “Missing Participants”

Includes several categories of individuals (not mutually exclusive):

- Participants that cannot be located (e.g., bad address, missing information);
- Nonresponsive participants at normal retirement date or required beginning date;
- Participants who are likely deceased, but the death cannot be confirmed;
- Participants with uncashed checks or stopped payments; and
- Beneficiaries who cannot be located or identified.

Different categories present distinct challenges.

- For example, uncashed checks could involve recalcitrant (but not missing) payees.
- Beneficiaries may have no connection to the plan or plan sponsor.

Historic Lack of DOL Guidance

Historically, no direct DOL authority other than general reference to ERISA fiduciary standards

DOL Field Assistance Bulletin (FAB) 2014-01 requires plan fiduciaries to perform all of the following:

- Use certified mail;
- Check related plan and employer records;
- Check with the designated plan beneficiary;
- Use free electronic search tools; and
- Use search tools that cost money (if facts and circumstances warrant).

FAB 2014-01 applies only to terminating defined contribution plans

DOL Terminated Vested Participant Project (TVPP)

Pilot began in 2015. Expanded across all regions with numerous investigations.

Now a DOL investigatory priority, and many plans and service providers have been subject to lengthy investigations that require significant plan resources.

As a result, fiduciaries often found themselves

- Defending existing practices and procedures (and legacy systems limitations).
- Expending significant plan resources.
- Despite the absence of clear, up-to-date guidance beyond ERISA's overarching fiduciary standards.

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Overview of New DOL Guidance

New DOL Sub-Regulatory Guidance

Missing Participant - Best Practices for Pension Plans

- Suggested practices for fiduciaries seeking to navigate missing participant issues.

Compliance Assistance Release No. 2021-01: Terminated Vested Participants Project Defined Benefit Pension Plans

- Instructions to DOL investigators on TVPP investigations.

Temporary Enforcement Policy Regarding the Participation of Terminating Defined Contribution Plans in the PBGC Missing Participants Program

- Field Assistance Bulletin No. 2021-01
- Temporary relief and nonenforcement for plans in the PBGC missing participants program (for fiduciaries of terminating defined contribution plans and qualified termination administrators of abandoned individual account plans).

Guidance 1: Missing Participant – Best Practices for Pension Plans

Applies to both defined contribution plans, such as 401(k) plans, and defined benefit plans.

Recognizes that “the size of a participant’s accrued benefit and account balance as well as the cost of search efforts,” and the appropriate steps to locate and communicate with a missing or nonresponsive participant, “will depend on the facts and circumstances particular to a plan and participant.”

Lists “examples of best practices” in four categories.

Guidance 1: Missing Participant – Best Practices for Pension Plans

1) Maintain accurate census information

- Regularly contact participants and beneficiaries to confirm/update contact information;
- Maintain online systems that allow participants and beneficiaries to update their own information and request contact information updates upon log-in to account;
- Audit census information; and
- Make contact information updates part of acquisitions and transfers of plan and employer records.

2) Implement more effective communication strategies

- Use plain English and clearly and prominently state the reason for the communication;
- Encourage contact with the plan; and
- Mark envelopes and correspondence with the original plan or sponsor name for participants who might not be aware of changes to the plan/plan sponsor.

Guidance 1: Missing Participant – Best Practices for Pension Plans

3) Improve missing participant searches

- Check plan and employer records for alternative contact information;
- Contact beneficiaries and employer emergency contacts;
- Use free and commercial locator searches;
- Use certified mail or other mail services that provide tracking; and
- Register missing participants on public and private registries that have privacy and cybersecurity protections.

4) Document procedures and actions

- Monitor third-party recordkeepers and other service providers; and
- Ensure consistent implementation and compliance.

Guidance 2: Compliance Assistance Release No. 2021-01

(TVPP Guidance to Investigators)

Stated purpose is to "ensure consistent investigative processes and case-closing practices . . . and to facilitate voluntary compliance efforts by plan fiduciaries."

Identifies three key objectives of TVPP initiative:

1. Ensure adequate records to determine plan benefits;
2. Ensure appropriate procedures to advise participants with vested accrued benefits; and
3. Implement appropriate search procedures.

Even though targeted at investigations, could be viewed as supplemental "suggested practices."

Guidance 2: Compliance Assistance Release No. 2021-01

(TVPP Guidance to Investigators)

Identifies errors that the DOL looks for, such as:

- Systemic errors in plan recordkeeping and administration;
- Inadequate procedures for identifying and locating missing participants and beneficiaries;
- Inadequate procedures for contacting term-vested participants and beneficiaries of deceased term-vested participants; and
- Inadequate procedures for addressing uncashed distribution checks.

Articulates examples of what the DOL views as insufficient practices, such as:

- "Continuing to deliver required communications to a known 'bad address' without taking steps to verify the correct address;"
- Failing "to take advantage of or properly use the missing participant search and location services offered or provided by the plan's record keeper or other service providers;" and
- Plans with "clearly flawed data" such as birthdates of "1/1/1900" or names of "John Does."

Guidance 2: Compliance Assistance Release No. 2021-01

(TVPP Guidance to Investigators)

Outlines "How Cases are Closed" in a manner that can be informative for plans under investigation.

- When the DOL finds "systemic errors," the DOL's "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."
- The DOL also asks that plans "take appropriate corrective actions regarding their policies and practices regarding missing participants."

DOL includes important clarification regarding findings of fiduciary breach.

- Individual fiduciaries should not be found to violate ERISA "absent especially substantial errors or widespread fiduciary breaches."

Guidance 3: Field Assistance Bulletin No. 2021-01

(Temporary Enforcement Policy)

- Applies to fiduciaries of terminating defined contribution plans and QTAs of abandoned plans.
- Geared at the use of the PBGC's expanded Missing Participants Program.
- Requires that distributions be rolled over to an IRA, bank account, or state unclaimed property fund.
- Notices to 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."
- PBGC charges a flat fee for certain accounts transferred.
- Plan fiduciary can elect to not transfer the account balances for all missing participants in the plan.
- Non-enforcement policy does not preclude the DOL from pursuing violations under Section 404 or 406 of ERISA.

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Observations and Considerations for Plan Sponsors and Service Providers

Observations for Plan Fiduciaries

Evaluate current practices compared to "best practices" and TVPP guidance

- Where are there gaps?
- What practices can reasonably be implemented?
- Which practices are challenging or problematic?
- Which practices could benefit from recordkeeper/service provider support?
- Document determinations to not adopt processes suggested by the DOL.

Review agreements with service providers and make sure that their responsibilities are clearly defined.

Review plan documents

- Plan and SPD should make clear that participants are responsible for keeping their addresses updated.
- Include a section on missing participants and when a forfeiture is deemed to occur.
- Plan should be clear regarding the mandated benefit commencement date.

Consider communications for "recalcitrant participants," including:

- Notify participants regarding payment deadline.
- Provide multiple opportunities to elect payment.
- Clarify what will happen if a participant does not return election forms.

Observations for Service Providers

Review agreements with plan sponsors

- Are responsibilities clearly defined?
- Are current practices and operations consistent?

Review prototype plan documents

- Plan and SPD should make clear that participants are responsible for keeping their addresses updated.
- Include a section on missing participants and when a forfeiture is deemed to occur.
- Plan should be clear regarding the mandated benefit commencement date.

Consider guidance compared to current service levels

- Are there gaps?
- Which “best practices” can be supported?
- What are plan sponsors asking for?

Review uncashed check process

Consider implementing periodic efforts to review and clean up recordkeeping data.

Observations on Risks

Some have expressed a concern that guidance could be used as a compliance checklist.

The DOL acknowledged that:

“[n]ot every practice . . . is necessarily appropriate for every plan” fiduciaries “should consider what practices will yield the best results in a cost-effective manner” plan fiduciaries are permitted to consider “the size of a participant’s accrued benefit and account balance as well as the cost of search efforts ”the appropriate steps to locate and communicate with a missing or nonresponsive participant “will depend on the facts and circumstances particular to a plan and participant.”

Nonetheless, the DOL, or private litigants, may attempt to frame the DOL guidance as a baseline of expected practices.

More Observations

The DOL acknowledges permissible forfeitures:

- "ERISA's fiduciary obligations fully apply to missing participants whose accounts the plan purports to treat as 'conditionally forfeited' under Treasury Regulation 1.411(a)-4(b)(6)."
- But the DOL believes that there is still a duty to search.

The TVPP Audit Release includes a footnote that "[p]lans that rely on the new electronic disclosure rule's provisions requiring prompt action to address inaccurate electronic addresses should find a dramatic reduction in the scope of this problem."

- Reliance on the DOL's electronic disclosure safe harbor may assist fiduciaries and relieve some of the burdens associated with the missing participant obligations.

Unanswered Questions

- How should plans handle participants that are the least likely to be locatable and/or still due a benefit?
- How should plans address identity theft?
- How may plan resource limits hinder search and outreach efforts?
- How should plans deal with the challenges of participant inaction (such as participants that are not missing but voluntarily do not commence benefits or do not cash checks or otherwise refuse to engage with the plan)?
- Can entities (e.g., committees or plan sponsors) be found in breach of ERISA for facts that are not egregious?

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