DOL Guidance on Missing Participants Is No Longer Missing

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Agenda

- Missing Participant Challenges – Background, Including the DOL’s Investigatory Efforts
- New DOL Guidance
- Observations
- Unanswered Questions
- Non-Enforcement Guidance
- Service Provider Considerations

MISSING PARTICIPANT CHALLENGES – BACKGROUND

Missing Participant Challenge – Background

- Long-standing problem with a recent focus by of all the federal agencies that regulate retirement plans (e.g., DOL, PBGC, and IRS), Congress, the Government Accountability Office, and even state insurance regulators.
- Large, complex DB plans that combine multiple legacy plans face the most challenges.
  - Generally, deferred vested participants in such plans cannot commence benefits until normal retirement age (or early retirement age if they had sufficient service).
  - This can lead to 30+ year gaps between termination and commencement; plenty of time for participants to get lost.
  - Compounding the problem can be the absence of good records and pension files from old acquisitions and plan mergers.

Different Types of “Missing Participants”

- The term “missing participants” includes a number of categories of individuals (not mutually exclusive):
  - A participant whom the plan cannot locate (e.g., no valid address or missing key information);
  - A nonresponsive and unpaid participant at the participant’s normal retirement date (NRD) or required beginning date (RBD);
  - A participant who is likely deceased and the plan cannot confirm the death;
  - A participant with uncashed checks or stopped payments;
  - A beneficiary who has not commenced benefits after the participant’s death (or has become lost).
- The different categories can present distinct challenges.

  For example, a nonresponsive or unpaid participant may not be missing, but may resist starting his or her benefits. Similarly, a plan may not have sufficient information to identify or search for a beneficiary, or a beneficiary might resist starting benefits.

Applicable Legal Standards: Fiduciary Duties under ERISA

- Fiduciary duties under ERISA include:
  - The Duty of Loyalty
    - A fiduciary must discharge his or her duties with respect to a plan *solely* in the interest of the plan's participants and beneficiaries and for the *exclusive* purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.
  - The Duty of Prudence
    - A fiduciary must act "with the care, skill, prudence, and diligence then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."
- As applied to lost and missing participants, the DOL has indicated:
  - Plan fiduciaries have a responsibility to pay benefits when due.
  - This responsibility includes a requirement to take reasonable steps to locate participants, communicate with participants about their benefits, and help facilitate payment.
  - The unresolved legal question is what the "reasonable" standard requires.

Historical Lack of DOL Guidance

- Historically, there has been no direct DOL authority regarding the fiduciary duties as applied to ongoing plan administration.
- The closest guidance was the DOL Field Assistance Bulletin (FAB) 2014-01, which opined that a fiduciary has not discharged his or her obligation to locate a missing participant unless and until all of the following actions are taken:
  - Using certified mail;
  - Checking related plan and employer records;
  - Checking with the designated plan beneficiary;
  - Using free electronic search tools; and
  - If the facts and circumstances warrant it, using search tools that cost money such as internet search tools.
- But, by its terms, FAB 2014-01 applies only to terminating defined contribution plans, so this created confusion about the required legal standard.

DOL Terminated Vested Participant Project

- The DOL Terminated Vested Participant Program (TVPP) initiative began as a pilot program in 2015. The DOL then expanded the program nationwide with numerous investigations across all regions.
- The TVPP has become a key focus of DOL investigatory activities and its reported "successes."
  - The DOL recently announced that in the last year "[r]ecoveries on behalf of terminated vested participants played a **large role in** [its enforcement results]. In total, EBSA's enforcement program helped **over 29,600 terminated vested participants** in defined benefit plans collect benefits of **over $1.48 billion** owed to them."
- As a result, the initiative has become a DOL investigatory priority, and many plans have been subject to these investigations.

DOL TVPP: Key Takeaways

- In the investigations, the DOL often takes an aggressive view of what is required of fiduciaries, including:
  - There is a fiduciary responsibility to find and pay *every* missing participant and to get *every* deferred vested participant into payment; and
  - That the existence of small numbers of missing participants, unpaid participants, record errors, or uncashed checks is a fiduciary breach.
- The DOL has not seemed receptive to certain competing factors, such as:
  - The ability of fiduciaries to balance costs and benefits (instead, the DOL seems to be pushing a "do whatever it takes" standard);
  - That some people can never be located, or that some participants will not want to commence benefits; or
  - That plans often inherit legacy problems (such as record gaps) that cannot be fixed.
- And, most importantly, the DOL investigators were not willing to acknowledge the lack of legal standards (or to hold off on the investigations pending legal standards).

DOL Adverse Findings

- Instead, in many investigations the DOL has been subjecting plans to lengthy investigations that require significant plan resources.
- Also in many investigations, the DOL has made findings of breaches of fiduciary duty.
- ***As a result, plan fiduciaries often found themselves defending existing practices and procedures (and legacy systems limitations) and expending significant plan resources, despite the absence of clear, up-to-date guidance beyond ERISA’s overarching fiduciary standards.***

NEW DOL GUIDANCE

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New DOL Sub-Regulatory Guidance

- On January 12, the DOL provided three long-awaited pieces of sub-regulatory guidance that provide some clarity.
  - Missing Participant - Best Practices for Pension Plans – Provides a potential roadmap for ERISA fiduciaries seeking to navigate the missing participant issue.
  - Compliance Assistance Release No. 2021-01: Terminated Vested Participants Project Defined Benefit Pension Plans – Provides instructions to DOL investigations on the TVPP investigations.
  - Field Assistance Bulletin No. 2021-01: Temporary Enforcement Policy Regarding the Participation of Terminating Defined Contribution Plans in the PBGC Missing Participants Program – Provides temporary relief and nonenforcement for plans in the PBGC missing participants program (applicable to fiduciaries of terminating defined contribution plans and qualified termination administrators of abandoned individual account plans).

Guidance 1: Missing Participant – Best Practices for Pension Plans

- The Missing Participant – Best Practices for Pension Plans guidance provides a list of "examples of best practices" in four categories.
- Maintaining accurate census information
  - Regularly contacting participants and beneficiaries to confirm/update contact information;
  - Maintaining online systems that allow participants and beneficiaries to update their own information and requesting contact information updates upon log-in to account;
  - Auditing census information; and
  - Making contact information updates part of acquisitions and transfers of plan and employer records.

Guidance 1: Missing Participant – Best Practices for Pension Plans

- Implementing more effective communication strategies
  - Using plain English and clearly and prominently stating the reason for the communication;
  - Encouraging contact with the plan; and
  - Marking 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

- Improving missing participant searches
  - Checking plan and employer records for alternative contact information;
  - Reaching out to beneficiaries and employer emergency contacts for updated contact information;
  - Using free and commercial locator searches;
  - Using certified mail or other mail services that provide tracking; and
  - Registering missing participants on public and private registries that have privacy and cybersecurity protections.
- Documenting a plan’s procedures and actions
  - Oversight of third-party recordkeepers and other service providers; and
  - Ensuring consistent implementation and compliance.

Guidance 2: Compliance Assistance Release No. 2021-01 (TVPP Guidance to Investigators)

- Stated purpose of the guidance 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:
  - Ensure adequate records to determine plan benefits,
  - Ensure appropriate procedures to advise participants with vested accrued benefits, and
  - Implement appropriate search procedures.
- ***Even though stated as targeted for investigations, this DOL guidance could be viewed as providing a supplemental set of DOL viewed 'suggested practices.'***

OBSERVATIONS

Observations Regarding Guidance

- The “Best Practices” guidance is helpful, and plan fiduciaries may want to consider the list against their current practices.
- Similarly, the TVPP guidance to investigators could provide a roadmap for plans in investigations to understand what will be needed to demonstrate compliance and seek closure of the investigation.
  - The guidance could also provide a compliance roadmap for those plans not in investigations.
- Plan fiduciaries may want to use both documents to consider which practices can be reasonably implemented and document their progress for applying the practices (or the reasons not to apply the practices).
  - For plans that work with outsourced providers (such as recordkeepers or search firms) this could be a list of requests from the providers.
- A key part of this consideration could be **documenting determinations not to adopt processes suggested by the DOL**.

Observations Regarding Guidance: Risk of the Guidance

- But, while helpful, there is a concern that the two pieces of guidance could be used as a compliance checklist.
  - On the one hand, the DOL acknowledged that:
    - "[n]ot every practice . . . is necessarily appropriate for every plan"
    - that fiduciaries "should consider what practices will yield the best results in a cost-effective manner"
    - that 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"
    - that 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"
  - ***But there is a concern that the DOL, or private litigants, may attempt to frame the DOL guidance as a baseline of expected practices.***

More Observations

- The "Best Practices" guidance applies to both defined contribution plans, such as 401(k) plans, and defined benefit plans.
- 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

Unanswered Questions

- The DOL failed to answer many of the challenges of missing participant issues, such as:
  - How plans should handle participants that are the least likely to be locatable and/or still due a benefit?
  - How plans should address identity theft?
  - How plan resource limits may hinder search and outreach efforts?
  - How plans should 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)?
  - If entities (e.g., committees or plan sponsors) can be found in breach of ERISA for facts that are not egregious?

NON-ENFORCEMENT GUIDANCE

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 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.

SERVICE PROVIDER CONSIDERATIONS

Service Provider Considerations

- The DOL stated that fiduciaries should consider "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."
- The "Best Practices" guidance suggests the use of social media along with other public databases to conduct missing participant searches.
- The plan and SPD should make clear that participants are responsible for keeping their addresses updated.
- Plan documents should include a section on missing participants and when a forfeiture is deemed to occur.
- The plan should be clear regarding the mandated benefit commencement date.
- Consider communications for "recalcitrant participants," including:
  - Notify participant regarding payment deadline.
  - Provide multiple opportunities to elect payment.
  - Make clear in communications what will happen if a participant does not return election forms.
- Consider, in addition to the regular process, periodic efforts to review and clean up recordkeeping data.

QUESTIONS?

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Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19.**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.

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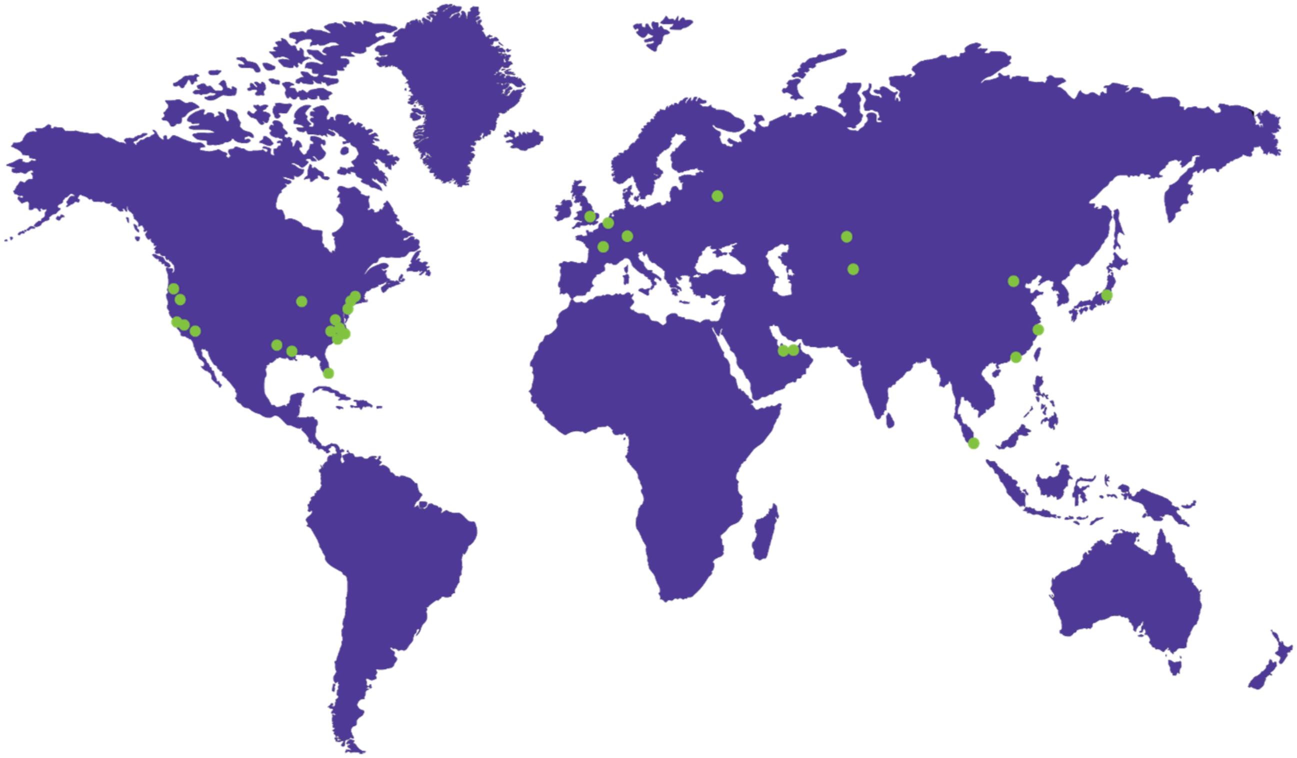

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